Exhibit 1

USAC
Universal Service Administrative Company

Administrator's Decision on Contributor Issue

By Electronic and Certified Mail

January 15, 2008

Steven A. Augustino, Esq.
Kelley Drye & Warren LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, D.C. 20007-5107

Re: Intercall, Inc.

Dear Mr. Augustino,

USAC has reviewed the information you provided as counsel to Intercall, Inc. (Intercall) concerning the company's obligations to file requisite forms and contribute to the Universal Service Fund (USF). USAC appreciates the information provided to us by Intercall during and since our meeting of May 31, 2007, including the supplemental information provided on June 5, 2007, October 5, 2007 and November 1, 2007 as well as the initial information provided on April 30, 2007. After reviewing this information and applicable Federal Communications Commission (FCC or Commission) regulations, USAC has concluded that the audio bridging services provided by Intercall are toll teleconferencing services, which must file the requisite forms and, if required under the Commission's rules, contribute to the USF. Following is a further discussion of this matter.

"Entities that provide interstate telecommunications to the public or to such classes as users as to be effectively available to the public, for a fee will be considered telecommunications carriers providing interstate telecommunications services and must contribute to the [USF]." 47 C.F.R. § 54.706(a). "Contributions [to the USF] shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet which shall be published in the Federal Register. The Telecommunications Reporting Worksheet sets forth the information that the contributor must submit to [USAC] on a quarterly and annual basis." 47 C.F.R. § 54.711(a).

USAC notes that counsel for Intercall argued in its June 5, 2007 letter to USAC that "[a]udio bridging (indeed, teleconferencing in general) is not listed among the 19 types of services that must contribute to the fund."[1] Two paragraphs above this language on the

[1] Letter from Steven A. Augustino, Esq., Kelley Drye & Warren LLP, to David A. Capozzi, Esq., Acting General Counsel, Universal Service Administrative Company, June 5, 2007, at 4.

same page, counsel for Intercall stated: "In all, the FCC requires 19 types of telecommunications carriers or providers of telecommunications to contribute to the [USF]...."[2] Counsel for Intercall then provides the list of providers specified in 47 C.F.R. § 54.706(a). We note, however, that the sentence introducing the list specifically states the list is not all inclusive: "Interstate telecommunications include, *but are not limited to*:..."[3] Because the list in the regulation is meant to provide examples and not be all inclusive, as its language specifically states, the list itself does not provide toll teleconferencing operators with an exemption from USF reporting and contribution requirements as Intercall argues.

Since 2002, the Form 499-A instructions have specifically stated: "Line 314 and Line 417 should include toll teleconferencing."[4] This language is clear and does not give USAC discretion to exclude these services from USF contribution obligations. In addition, Intercall has presented no convincing evidence that the services it provides are anything other than toll teleconferencing services regardless as to how it labels its products.

We note that Intercall mentioned during the meeting with USAC on May 31, 2007 that it is reasonably certain the fees it pays carriers for lines to connect callers to its services already include USF charges and the carriers pay the USF contribution amounts to USAC. Regardless, if Intercall is buying lines from a carrier where the carrier has already contributed to the USF for such lines, Intercall may not claim an exemption from filing the required forms and contributing to the USF absent Commission rules that provide for such an exemption. USAC is unaware of any Commission regulation or policy exempting Intercall or a company that provides similar products or services from USF filing or contribution obligations because a carrier from which it purchases lines pays the USF contribution obligations associated with these lines. In addition, Intercall cannot, by contract, shift their 499 Filing obligation to its underlying carrier(s).[5]

As to the potential issue of double billing of USF charges, it is Intercall's responsibility to enter into an arrangement with its underlying carriers to ensure that USF contributions are made only once on the same line. These types of arrangements are not uncommon. Once Intercall files the requisite forms, if it is found that Intercall has a direct contribution obligation to the USF, Intercall may wish to seek reimbursement from its underlying carrier(s) for the amount of any USF contribution associated with the lines it purchased to avoid the above mentioned issue of double payment.

USAC has concluded that Intercall must file the FCC Form 499 and potentially contribute to the USF pursuant to the requirements set forth in the FCC regulations discussed above. We note that Intercall has never filed an FCC Form 499. Given that

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[2] *Id.* at 4.
[3] 47 C.F.R. § 54.706(a) (*emphasis added*).
[4] *See* Form 499-A Instructions.
[5] *See generally, In the Matter of Federal-State Joint Board on Universal Service, Request for Review by Big River Telephone Company, LLC*, FCC DA 07-1277, 22 FCC Rcd 4974, 4978, T ¶ 12 (2007).

USAC was considering this matter during this time period and Intercall may have assumed it did not have to make required filings, Intercall has 60 days from the date of this letter to make all required Form 499 filings, including filing any and all previous FCC Form 499s that have come due since Intercall started providing interstate telecommunications.[6] Failure to do so within this timeframe will result in a violation of 47 C.F.R. § 54.711, thereby making Intercall subject to the provisions of 47 C.F.R. § 54.713.

Finally, we note that counsel for Intercall offered other information in this matter that USAC does not consider dispositive in making the decision discussed herein. For example, counsel for Intercall has provided redacted copies of emails between a Mr. Edwin Heinen of Conferencecallservice.com and the Commission's Enforcement Bureau and between Mr. Heinen and the National Exchange Carrier Association (NECA). Counsel for Intercall attempts to use these emails to argue that it has been granted an exemption from universal service filing and contribution obligations by an employee of NECA. We note that the NECA employee indicated to Mr. Heinen that his company does not have a Form 499-A filing obligation based on what appears to be an email from Mr. Heinen to the NECA employee describing the company's business. Regardless of the content of these emails, neither NECA nor USAC have the discretion to provide the exemption from universal service filing and contribution obligations to any party. Authority to do so rests solely with the Commission and the United States Congress. In addition, counsel for Intercall attempts to use an excerpt from the Commission's decision *In the Matter of Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company* (FCC 07-175, rel. October 2, 2007), in which the Commission stated that conference calling companies are "end users."[7] Counsel for Intercall attempts to use this statement out of context to argue that end users such as Intercall are information service providers not subject to USF filing and contribution obligations. Nevertheless, given the clear language of the Form 499-A instructions that toll teleconferencing providers must report revenue on the form, these arguments made by counsel for Intercall are not within USAC's discretion to consider.

[6] The requirement for Intercall to make these filings should not be an "out of the blue" surprise given that ECI, Inc., the company Intercall acquired on December 1, 2004, made all required filings until its acquisition by Intercall. USAC in a telephone conversation with Toby Rumack of ECI on April 1, 2005 explained that ECI had a filing obligation because they provided interstate toll teleconferencing services and the company was not allowed under FCC regulations to simply transfer that obligation to its underlying carrier. In a subsequent conversation on October 31, 2006 with Darius Withers and Steven Augustino–outside counsel for Intercall (the company that purchased ECI)–USAC again discussed the Form 499 instructions that toll teleconferencing companies must file the Form 499 and report revenues on line 417. On May 17, 2007, USAC stated during a telephone conversation with Steven Augustino if InterCall did not become compliant with the Form 499 filing obligations, USAC would consider referring InterCall to the FCC Enforcement Bureau.

[7] FCC 07-175 at ¶ 35.

This letter serves as the decision of the USF Administrator. Should Intercall wish to seek relief from the provisions of 47 C.F.R. § 54.706, it may wish to file an appeal and/or a petition for waiver with the FCC. Detailed instructions for filing appeals are available at:

http://www.universalservice.org/fund-administration/contributors/file-appeal

Sincerely,

USAC

cc: Regina Dorsey, FCC Office of Managing Director
Hillary DeNigro, FCC Enforcement Bureau
Trent Harkrader, FCC Enforcement Bureau
Jeremy Marcus, FCC Wireline Competition Bureau

Exhibit 2

July 19, 2007

Mr. Jerry Price
Director of Enterprise Telecom Expenditures
West Corporation
11808 Miracle Hills Drive
Omaha, NE 68154

Dear Jerry:

I am a Signature Client Director for AT&T. I am responsible for the account that West Corporation and/or its subsidiary, Intercall, Inc. (collectively "West"), maintains with AT&T. At your request, I am providing this letter concerning certain telecommunications services that AT&T supplies to West. The purpose of this letter is not to provide a detailed account of AT&T's process and other obligations involving the USF. The purpose is limited to state at a high level that West is a retail customer of AT&T, that West pays the federal USF surcharge to AT&T on certain services and that AT&T makes payments to the USAC that account for revenues received by AT&T from West for such services. Anything beyond this should be discussed with AT&T.

AT&T is a telecommunications carrier offering a wide array of telecommunications services to customers nationwide. AT&T Corp. has entered into a master services agreement with West Corporation, MA Reference Number 102040, (the "West MA") to provide various telecommunications services to West. Specifically, the primary service we provide is toll free 8YY dialed long distance telecommunications service. Under the terms of the West MA, West and its subsidiaries purchase such telecommunications services from AT&T as retail customers, and are not classified by AT&T as wholesale services customers. Accordingly, the West MA permits AT&T to charge West for expenses incurred by AT&T reasonably relating to regulatory assessments, including Universal Service Fund ("USF") related expenses.

Consistent with the terms of the West MA and applicable law, AT&T includes surcharges on monthly invoices to West to recover expenses related to regulatory assessments, including those relating to the USF based on the contribution factor for USF established by the FCC and in effect as of the bill date. We are registered with the Universal Service Administrative Corporation ("USAC") as a telecommunications carrier and report regularly to USAC on the amount of jurisdictionally interstate and domestic-international telecommunications services[1] revenue derived from our sales to end users, including West. The revenue received by AT&T from West in connection with our provision of such services is reported to USAC quarterly as part of our computation of our gross interstate and domestic-international telecommunications services revenue. Accordingly, AT&T[2] reports to the USAC the revenues it receives for such services from its customers, is billed USF fees attributable to such services provided to our customers, including West, and ultimately pays the USF amounts billed by the USAC.

Sincerely,

Sherry Naylon
AT&T Signature Client Director

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[1] Telecommunications services is defined in 47 U.S.C. Section 153.

[2] In this context, "AT&T" means AT&T Communications and Teleport Communications Group, the entities registered with the USAC.

ITC DELTACOM®

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July 19, 2007

Addressed to: Jerry Price, Director of Enterprise Telecom Expenditures, West Corporation

Dear Jerry:

I am Senior Vice President of Finance for Deltacom, Inc. [name of carrier]. I am responsible for the account that West Corporation and/or its subsidiary, Intercall, Inc., maintains with Deltacom, Inc. [carrier]. At your request, I am providing this letter concerning the telecommunications services that Deltacom, Inc. [carrier] supplies to West and Intercall.

Deltacom, Inc. [carrier] is a telecommunications carrier offering a wide array of telecommunications services to customers nationwide. We have entered into a master services agreement with West to provide various telecommunications services to West and/or Intercall. Specifically, the primary service we provide is toll free 8YY dialed long distance telecommunications service. Under the terms of our agreement, West and its subsidiaries purchase such telecommunications services from us as enterprise end user customers, and are not classified by us as telecommunications carriers or other wholesale services customers. Accordingly, our master services agreement entitles us to charge Universal Service Fund ("USF") and other regulatory related fees to West as a billing surcharge.

Consistent with the terms of the master services agreement, our practice is to include a surcharge on our monthly invoices to West adequate to recover the then current contribution factor for USF, as well as certain other regulatory related fees (such as TRS and FCC administrative fees) as specified by our tariffs and service guides. We are registered with the Universal Service Administrative Corporation ("USAC") as a telecommunications carrier and report regularly to USAC on the amount of interstate telecommunications revenue derived from our sales to end users, including West. The revenue received by Deltacom, Inc. [carrier] from West in connection with our provision of interstate telecommunications services is reported to USAC quarterly as part of our computation of our gross interstate telecommunications revenue. Accordingly, Deltacom, Inc.[carrier] bills USF and similar regulatory fees attributable to our services provided to West, and ultimately we remit the revenue derived from the USF/regulatory fee surcharge to the appropriate federal authorities.

Sincerely,

Sara L. Plunkett

Sara L. Plunkett
Senior Vice President Finance

Qwest.
Spirit of Service

Addressed to: Jerry Price, Director of Enterprise Telecom Expenditures, West Corporation

Dear Jerry:

I am a Director of Sales for Qwest Communications Corporation ("Qwest"). I am responsible for the account that West Corporation and/or its subsidiary, Intercall, Inc., maintains with Qwest. At your request, I am providing this letter concerning the telecommunications services that Qwest supplies to West and Intercall.

Qwest is a telecommunications carrier offering a wide array of telecommunications services to customers nationwide. We have entered into a master services agreement with West to provide various telecommunications services to West and/or Intercall. Specifically, the primary service we provide to West is toll free 8YY dialed long distance telecommunications service. Under the terms of our agreement, West and its subsidiaries purchase such telecommunications services from us as enterprise end user customers, and are not classified by us as telecommunications carriers or other wholesale services customers. Accordingly, our master services agreement entitles us to charge Universal Service Fund ("USF") and other regulatory related fees to West as a billing surcharge.

Consistent with the terms of the master services agreement, our practice is to include a surcharge on our monthly invoices to West adequate to recover the then current contribution factor for USF, as well as certain other regulatory related fees (such as TRS and FCC administrative fees) as specified by our tariffs and service guides. We are registered with the Universal Service Administrative Corporation ("USAC") as a telecommunications carrier and report regularly to USAC on the amount of interstate telecommunications revenue derived from our sales to end users, including West. The revenue received by Qwest from West in connection with our provision of interstate telecommunications services is reported to USAC quarterly as part of our computation of our gross interstate telecommunications revenue. Accordingly, Qwest is billed USF and similar regulatory fees attributable to our services provided to West, and ultimately we remit the revenue derived from the USF/regulatory fee surcharge to the appropriate federal authorities.

Sincerely,

Tina Smith
Director of Sales
Qwest Communications Corporation

Exhibit 3

KELLEY DRYE & WARREN LLP
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June 5, 2007

David Capozzi, Esquire
Acting General Counsel
Universal Service Administration Corporation
2000 L Street, N.W., Suite 200
Washington, D.C. 20036

Dear Mr. Capozzi:

Thank you for taking the time to meet with us on Thursday. To amplify our discussion concerning the proper method for stand alone audio bridging providers to contribute toward the Federal Universal Service Fund ("FUSF"), Intercall, Inc. ("Intercall"), by its counsel, hereby submits this letter brief on the applicability of FCC regulations to audio bridging services. As shown below, stand alone audio bridging providers are not obligated to register as USF contributors. Audio bridging services are not telecommunications services and they have never been regulated as a telecom service under federal law. Rather, audio bridging services offer end users the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[1] As a result, the services are information services and audio bridging providers are information service providers under the Communications Act. They properly are treated as end users by their telecommunications service providers, and therefore contribute indirectly to the federal universal service fund.

Background

The conferencing services industry consists of audio, web and video conferencing services that are marketed to businesses and individuals worldwide. Audio bridging service is a form of conferencing service that allows multiple end users to communicate and collaborate with each other using telephone lines. Audio bridging services employ a device – an audio bridge – that links multiple communications together and feeds to each station a composite audio input

[1] 47 U.S.C. § 153(20).

minus the user's own audio.[2] The audio bridge also performs conference validation functions, collects billing and participant information for each bridged call and enables numerous conference control features, including recording, delayed playback, mute and unmute of callers and operator assistance. The most common forms of audio bridging services are operator-assisted conferences and on-demand "reservationless" conferencing services.

In a typical reservationless conference, the conference host is assigned a pre-established dial-in number for conferencing services. This dial-in number typically is a toll-free 8YY number uniquely assigned to the host or the host's company, but can also be an international number or a North American Numbering Plan ten-digit local number. Participants connect to the bridge using the dial-in number and, if enabled, enter a conference code/passcode assigned to the host. Once the conference code is validated, participants may announce their name and affiliation and then are placed in the conference. During a conference, the host has available a number of features, including operator assistance, the ability to poll participants, the ability to obtain a roll-call of participants, the ability to mute and unmute lines and the ability to lock or unlock the conference from additional participants.

To obtain the necessary telecommunications input, an audio bridging provider purchases toll-free, international and/or local number-based services from one or more telecommunications vendors. Typically, an audio bridging provider purchases these telecommunications inputs as an end user. That is, the audio bridging provider is the customer of record for each toll-free or telephone number used, and it is assessed all applicable taxes, surcharges and fees associated with the telecommunications services, including federal universal service fund charges assessed on interstate telecommunications services purchased by the provider.

The Federal Universal Service Fund

Section 254(d) of the Communications Act, as amended, establishes two classes of contributors to the federal universal service fund. First, Section 254(d) requires "every telecommunications carrier that provides interstate telecommunications services [to] contribute on an equitable and non-discriminatory basis" to the fund.[3] The Commission may exempt carriers or a class of carriers from this requirement, as it has done, for example, with carriers owing a *de minimis* amount, systems integrators, non-profit health care providers and certain

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2 See Newton's Telecom Dictionary, "Audio Bridge" (22nd ed.). Because audio bridging is provided through an external device, it differs from LEC-provided three-way calling, which is provided through the capabilities of a local exchange switch. *See id.*, "Three-Way Calling."

3 47 U.S.C. § 254(d).

other entities.[4] Subject to these exceptions, this mandatory class of contributors must report interstate end user revenues and contribute to the FUSF.

Second, Section 254(d) establishes an additional class of permissive contributors. The Commission *may* require "any other provider of interstate telecommunications" to contribute to the preservation and advancement of universal service "if the public interest so requires."[5] Thus, for non-telecommunications carriers who nevertheless provide "telecommunications," the Commission may require the entity to contribute to the fund, but *only* after making a determination that it is in the public interest to include this class of providers in the support fund. To date, the Commission has included only private carriers, payphone operators and interconnected VoIP providers pursuant to its permissive authority.[6]

The importance of the requirement that the FCC affirmatively order "providers of telecommunications" to contribute to the FUSF is underscored by the DC Circuit's recent decision in *Vonage v. FCC*.[7] In *Vonage*, the court upheld the FCC's classification of interconnected VoIP providers as "providers of telecommunications" for Section 254(d) purposes.[8] In so doing, the court concluded that the permissive category potentially is very broad.[9] All information service providers, according to the court, are potential "providers of telecommunications" for purposes of Section 254(d).[10] The public interest test, therefore, serves a critical role in defining clearly those entities obligated to contribute to the FUSF as permissive contributors.

With respect to the category of "information services," Section 254(d) neither requires contributions from such providers nor specifically precludes such providers from being required to contribute to the fund under the Act's permissive authority. The FCC, however, has excluded information service providers from any obligations to contribute directly to the FUSF.[11] This exclusion does not mean that information service providers do not contribute at all. In its 1998 *Universal Service Report to Congress*, the FCC noted that information service providers

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4 47 C.F.R. §§ 54.706(d), 54.708.

5 47 U.S.C. § 254(d).

6 *See* 47 C.F.R. § 54.706(a).

7 *Vonage Holdings Corp. v. FCC*, slip op., No. 06-1276 (DC Cir. June 1, 2007).

8 *Vonage*, slip op. at 13.

9 *Id.* (using the FCC definition, car dealers are "providers of engines" because engines are an input to automobiles).

10 *Id.* at 14.

11 Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, 9179-80 (¶ 788) (1997).

often are large users of telecommunications services and therefore contribute to the FUSF indirectly through charges assessed by their telecommunications service providers.[12]

In all, the FCC requires 19 types of telecommunications carriers or providers of telecommunications to contribute to the federal universal service fund. These 19 entities are providers of the following services: (1) cellular telephone and paging services, (2) mobile radio services, (3) operator services, (4) personal communications services (PCS), (5) access to interexhange service, (6) special access service, (7) WATS, (8) toll-free service, (9) 900 service, (10) message telephone service (MTS), (11) private line service, (12) telex, (13) telegraph, (14) video services, (15) satellite service, (16) resale of interstate services, (17) payphone services, (18) interconnected VoIP services and (19) prepaid calling card providers.[13]

Notably, the FCC's list of services required to contribute does not include conferencing services, teleconferencing or audio bridging services.

The 2002 Revisions to the FCC 499-A Instructions Do Not Obligate Audio Bridging Providers to Contribute Directly

If not for a 2002 change in the FCC Form 499-A, there would be no question as to the proper treatment of audio bridging services. As discussed above, in its orders implementing Section 254 of the Communications Act, the Commission did not require audio bridging providers to contribute toward the FUSF. Audio bridging (indeed, teleconferencing in general) is not listed among the 19 types of services that must contribute to the fund. The Commission did not classify audio bridging services as telecommunications services (and therefore subject to mandatory contributions), nor did it exercise its permissive authority to require audio bridging service providers to contribute to the fund. In short, nothing in the FCC's implementing orders subjects audio bridging service providers to direct universal service payment obligations.

In the 1998 form first used by the FCC to collect revenue information, the FCC does not list teleconferencing services, audio bridging services or any other type of conferencing

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12 Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11501, 11547-48, ¶ 97 (1998) (*Universal Service Report to Congress*)

13 47 C.F.R. § 54.706(a).

service.[14] The same is true for the forms used for filings due in 1999 through 2001, including the first Forms 499-A used for USF reporting purposes.[15]

It was not until 2002 when the USF forms first made reference to teleconferencing services. In the 2002 revision, which was announced by the Common Carrier Bureau by Public Notice on March 4, 2002,[16] teleconferencing services were mentioned for the first time in connection with USF reporting obligations. Teleconferencing services were mentioned in two places.

- Lines 303 and 404 (Fixed local services) – "This line should include charges for optional extended area service, dialing features, added exchange services such as automatic number identification (ANI) or teleconferencing, local number portability (LNP) surcharges, ..."[17]

- Lines 314 and 417 (All other long distance services) – "All other long distance services should include other revenues from providing long distance communications services. Line (314) and Line (417) should include toll teleconferencing. ..."[18]

Both instructions have remained unchanged in the 499-A form since 2002.[19]

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14 The 1998 Form 457 is available on USAC's website at the following address: http://www.usac.org/_res/documents/about/pdf/499/Form%20457%20%20Jan-Dec%20%20Filed%20March%201998.pdf

15 *See* http://www.usac.org/fund-administration/forms/prior-year-forms.aspx (containing links to the 1999, 2000 and 2001 forms).

16 Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2002 Filing by all Telecommunications Carriers, *Public Notice*, DA 02-529 (rel. Mar. 4, 2002) (*2002 Form 499 Public Notice*).

17 2002 Form 499-A Worksheet and Instructions, at 18 (instructions for lines 303 and 404) (*2002 499-A Instructions*) (emphasis added), available at: http://www.usac.org/_res/documents/about/pdf/499/499a_2002.pdf

18 *2002 499-A Instructions* at 20 (instructions for lines 314 and 417).

19 *See, e.g.* Telecommunications Reporting Worksheet, FCC Form 499-A (2007), Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration and Local Number Portability Support Mechanisms, at 24 (lines 303 and 404), 28 (lines 314 and 417).

The 2002 Form appears to be the sole support for the USAC staff's informal position that audio bridging providers are subject to the FUSF. But the 2002 changes cannot obligate audio bridging providers to file 499 forms.

First, the 2002 change is not a binding Commission rule. The changes to the 2002 499-A Form were not adopted pursuant to notice and comment rulemaking procedures. The Commission did not announce its intention to expand the revenue base. To the contrary, three years earlier, when the Commission combined USF, TRS, NANP and LNP reporting requirements into the single 499 Form, it "[did] not revisit the substantive requirements of the support and cost recovery mechanisms, the class of contributors to each mechanism, or the services whose revenues are included in contribution bases."[20] Nor did the Commission provide an opportunity for interested parties to discuss the merits of adding teleconferencing services to the USF contribution base. Because the 2002 499-A Form was changed without notice and comment – and without a Commission order – its instructions cannot modify any substantive requirement of the universal service support mechanism.

Second, even if the Commission intended to expand the contribution base by modifying the 499 Form (which it did not), the Common Carrier Bureau lacked authority to do so.[21] In the *Carrier Contribution Reporting Requirements Order*, the Commission delegated to the Common Carrier Bureau authority to make modifications to the reporting forms. These delegations are reflected in the various FCC rules relating to the administration of the four support funds.[22] However, the Commission explained that the delegation is in fact very limited:

> These delegations extend to administrative aspects of the requirements, *e.g.*, where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance of the mechanisms and other similar details. ...

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20 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, *Report and Order*, 14 FCC Rcd 16602, 16605 (¶ 5) (1999) (*Contributor Reporting Requirements Order*); *see also id.* at 16616 (¶ 28) ("we do not intend to use this proceeding to redefine those services whose revenues are included in the contribution bases") and at 16654 (Final Regulatory Flexibility Analysis at ¶ 6) ("this Order does not increase the number of entities that must comply with these requirements").

21 USAC, of course, similarly lacks authority to expand the contribution base. *See* 47 C.F.R. § 54.702(c) (USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress").

22 *See* 47 C.F.R. §§ 54.711(c) (universal service fund); 52.17(b) (NANP administration); 52.32(b) (local number portability); 64.604(c)(5)(iii)(B) (TRS fund).

> ... We reaffirm that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.[23]

Thus, it is clear that the Bureau may not make any modification to the 499 Form that has the effect of changing the substance of the USF program. To the extent that the 2002 changes purport to expand the contribution base in any way, such changes would be null and void.

The Bureau suggested that it did not intend to make substantive changes to the USF program. Specifically, in the *2002 Form 499 Public Notice*, the Bureau states, somewhat cryptically, that it has "revised the worksheet based on Commission actions and court decisions as well as made editorial clarifications culminating in the current version, the April 2002 Worksheet."[24] In our research, we have found no Commission actions or court decisions that obligate any type of teleconferencing provider to contribute to the USF program. This leaves an "editorial clarification" as the only possible explanation for the references to teleconferencing services. However, as a clarification, the Bureau's action is unsupported. Nowhere in the FCC's Universal Service orders does the Commission extend USF reporting requirements to audio bridging or any other type of teleconferencing service. More specifically, the Commission's orders do not classify audio bridging as either a local service or a long distance service, the two types of services affected by the 2002 changes to the 499 Form. And, as discussed in the next section, audio bridging has not been subject to traditional telecommunications regulation in any other contexts, such as Section 214 authorizations, customer acquisition rules, transfer of control rules, etc.

Any expansive reading of the 2002 changes, therefore, would take the Bureau's action beyond an "editorial clarification" and into the realm of a substantive change to the USF rules. As stated above, the Bureau lacks authority to expand the contribution base by modifying the Form. Thus, if USAC were to interpret the 2002 changes to require audio bridging providers to contribute to the Fund, it would be attributing an impermissible action to the Common Carrier Bureau (now Wireline Competition Bureau). Under such circumstances, USAC would be obligated to seek guidance from the Bureau before adopting a position regarding the proper treatment of audio bridging services.[25]

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23 *Contributor Reporting Requirements Order*, 14 FCC Rcd at 16621 (¶¶ 39-40).

24 *2002 Form 499 Public Notice* at 2.

25 *See* 47 C.F.R. § 54.702(c).

USAC need not seek guidance on every potential ambiguity. Where possible, USAC should interpret instructions from the FCC in a way that renders the instructions lawful.[26] In this instance, if USAC interprets the references to "teleconferencing" in the 2002 changes to address services other than audio bridging, the Bureau would not be exceeding its delegated authority.

There is at least one interpretation that does not require the Bureau to have acted unlawfully. The instructions do not precisely identify which "teleconferencing" services are to be reported on the 499. The term "teleconferencing" is not defined in the Communications Act nor in the Commission's rules. It also is not defined in the 2002 changes themselves, either in the discussion of lines 303 and 404 (fixed local services) or 314 and 417 (other long distance revenues). Based on the context of its use in the instructions, the term appears to refer to switch-based three-way or multi-party calling traditionally offered by local exchange carriers, and not the audio conferencing service provided by entities such as Intercall. Specifically, the language relating to lines 303 and 404 discusses teleconferencing as an "added exchange service" similar to ANI delivery.[27] It is mentioned immediately after a reference to "dialing features" offered by a local exchange carrier, which, as with added exchange services, would be offered through the functionality of a local exchange switch. It appears, therefore, that "teleconferencing" as the term is used in the 2002 changes must be provided through a local exchange switch, presumably as part of a broader offering of exchange service. Only entities also offering local exchange services could provide "teleconferencing" as the term appears to be used.

Under this interpretation, LECs would report three-way calling revenues on lines 303 and 404 as local service. This is consistent with the historical treatment of "adjunct to basic" services, which the FCC rules classified as basic telecommunications services. On the other hand, stand alone audio bridging providers such as Intercall do not own local exchange switches and do not offer exchange services (nor any telecommunications services, for that matter). Its conferencing services are not switch-based features but are instead functionalities performed by equipment that Intercall connects to telecommunications services. Therefore, the services that Intercall offers would not be "teleconferencing" as that term is used in connection with lines 303 and 404 of the 499 Form.

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26 This principle is similar to that which courts will use in order to avoid interpreting statutes in a way that would render them unconstitutional.

27 *2002 Form 499-A Instructions* at 18 (lines 303 and 404 "should include charges for optional extended area service, dialing features, added exchange services such as automatic number identification (ANI) or teleconferencing, local number portability surcharges, connection charges, charges for connecting with mobile service and local exchange revenue settlements").

If "teleconferencing" in lines 303 and 404 means local exchange switch-based services, then the reference to "toll teleconferencing" in lines 314 and 417 must mean a similar switch-based feature offered on a toll basis. That is, "toll teleconferencing" is the long distance equivalent of the local teleconferencing referred to in lines 303 and 404. This would require that any toll teleconferencing also be offered through the features and capabilities of a local exchange or IXC switch. Again, because stand alone providers such as Intercall do not operate local exchanges, they could not be providers of toll teleconferencing as used in the 2002 changes.[28]

Interestingly, this interpretation of toll teleconferencing would also avoid a potential conflict with the immediately following portion of the 499-A Worksheet Instructions. This next section, which addresses non-telecommunications revenues of filing entities, states that information services should not be treated as telecommunications revenue. The Instructions provide "call moderation and call transcription services" as two examples of information services that are not subject to USF assessment.[29] Both call moderation and call transcription are features of the audio bridging services available to subscribers to Intercall's services.

Industry and FCC Actions are Consistent with the Conclusion that Audio Bridging Providers are not Obligated to Contribute Directly to the FUSF

That audio bridging providers are not subject to USF reporting and contribution obligations is consistent with standard practice in the audio conferencing industry. Intercall competes in the audio conferencing industry with dozens of other providers. The vast majority of these competitors are stand alone conferencing providers, such as Premier Global Services, Inc., Genesys Conferencing, Inc., WebEx Communications, Inc. and smaller providers offering services under trade names such as BudgetConferencing.com, ConferenceCall.com, AffordableConferenceCalls.com, Saveonconferences.com, Callaconference.com, and

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28 Alternatively, the reference to "toll teleconferencing" in connection with long distance services could refer to the toll component of a conferencing service. Stand alone providers of teleconferencing services would not be subject to a reporting requirement under this interpretation, provided they obtain the toll component from a telecommunications carrier and pay appropriate USF charges on the services. Carriers and carrier affiliates, on the other hand, might have to report a "toll teleconferencing" component in order to capture the imputed value of the toll service that is self-provisioned by a carrier in connection with a finished conferencing product. Without such a report, integrated carrier providers would enjoy an artificial cost advantage compared to stand alone providers of conferencing.

29 499-A Instructions at 29 (Line 418).

Discountconferencecall.com. To the best of Intercall's knowledge, none of these entities file 499 Forms or contribute directly to the FUSF.[30]

In our research, we have located only one non-carrier affiliated entity that currently provides conference calling services and is registered with USAC. That entity is Conference Plus, Inc., an Illinois-based entity that is a subsidiary of Westell Technologies.[31] This entity, however, appears to operate its own telecommunications network, including a long distance switch and its own local interconnection facilities.[32] Thus, this entity may be a telecommunications carrier for reasons not related to the conferencing services that it provides. If, for example, the company provides telecommunications services such as pre-paid calling cards or toll services using excess switch capacity, these non audio conference end-user revenues would be subject to FUSF contribution.

Furthermore, our research indicates that many carriers that contribute to the FUSF nevertheless list their audio conferencing services as information services. We have located at least four large rural local exchange carriers that are recipients of USF high cost funds, each of whom is publicly traded, that identify teleconferencing as an enhanced or information service in their SEC filings.[33] For example, one provider states in its 10-K filed in 2007:

> Enhanced Services. Our advanced digital switch and voicemail platforms allow us to offer enhanced services such as ... three-way calling, ... teleconferencing, video conferencing [and other services].

Another provider states in its 10-K filed in 2007, under the discussion of its RLEC business:

> We offer our customers a broad array of enhanced telephone services, including ... conference calling, voice mail, teleconferencing, [and other services].

Finally, the FCC has never applied its rules for telecommunications carriers to stand alone conferencing providers. For example, stand alone providers do not obtain 214

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30 A search for these entities on the FCC's database of 499 filers does not yield any matches. *See* http://gullfoss2.fcc.gov/cib/form499/499a.cfm

31 *See* http://gullfoss2.fcc.gov/cib/form499/499detail.cfm?FilerNum=823724

32 http://www.conferenceplus.com/conferenceplus/about/infrastructure.aspx.

33 Although the point can be illustrated without identifying the particular carriers involved, we can provide additional information on this point upon request.

authorizations, do not file tariffs or maintain price sheets as required by the FCC's detariffing rules, do not seek authorization for transfers of control, and are not subject to Truth-in-Billing requirements, to name just a few of the many obligations imposed on telecommunications carriers. Importantly, in the past few years, several telecommunications carriers have sold their conferencing businesses to stand alone conferencing providers. Even though a telecommunications carrier has an obligation to seek approval to transfer telecommunications customers and/or to terminate a telecommunications service, none of these carriers sought approval to transfer their conferencing customers.

The fact that the FCC has never applied these rules to the conferencing industry, even though it has been in existence for decades, confirms the view that audio bridging services are not "telecommunications services" under the Communications Act.

If the FCC Were to Classify Audio Bridging Services, It Most Likely Would Classify the Services as Information Services

Although USAC may not interpret the requirements of the Communications Act, it is likely that if the FCC were asked to classify audio bridging services, that it would classify the services as information services.

In the *Computer Inquiries* line of decisions,[34] the Commission created a distinction between basic services and enhanced services. A basic service offers transmission capacity for the movement of information without net change in form or content.[35] By contrast, an enhanced service contains a basic service component but also involves some degree of data processing that changes the form or content of the transmitted information.[36]

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34 *See* Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,, *Notice of Inquiry*, 7 FCC 2d 11 (1966) ("*Computer I NOI*"); Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, *Final Decision and Order*, 28 FCC 2d 267 (1971) ("*Computer I Final Decision*"); Amendment of Section 64.702 of the Commission's Rules and Regulations, *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC 2d 358 (1979) ("*Computer II Tentative Decision*"); Amendment of Section 64.702 of the Commission's Rules and Regulations, *Final Decision*, 77 FCC 2d 384 (1980) ("*Computer II Final Decision*"); Amendment of Section 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 FCC 2d 958 (1986) ("*Computer III*") (subsequent cites omitted) (collectively, the "*Computer Inquiries*").

35 *Computer II Final Decision*, 77 FCC 2d at 419-22, ¶¶ 93-99.

36 *Computer II Final Decision*, 77 FCC 2d at 420-21, ¶ 97.

In the Telecommunications Act of 1996, Congress replaced the basic vs. enhanced service distinction with definitions of the terms "telecommunications," "telecommunications service," and "information service."[37] An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[38] In the *Non-Accounting Safeguards Order*, the Commission determined that the statutory term "telecommunications service" is similar to the Commission's *Computer Inquiries* definition of a basic service, and the statutory term "information service" is similar to the definition of an enhanced service.[39] The primary difference between the terms is that the term "information service" includes all services that are offered "via telecommunications" and thus is broader than the enhanced service definition, which was limited to services that employed data processing functions.[40]

A. The Commission Would Evaluate Audio Conferencing Based on all of the Capabilities Offered to the End-User

When a service enables multiple features and functionalities, the initial question for classification purposes is whether an entity is providing "a single information service with communications and computing components" or "two distinct services, one of which is a telecommunications service."[41] Although there is not always a straightforward answer to this question, the Commission will evaluate this question based on the functionality as provided to the consumer.[42]

In the case of Internet access service, for example, the Commission noted that Internet access services typically provide the user with the ability to run a variety of applications,

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37 47 U.S.C. §§ 153(20), (43), and (46).

38 47 U.S.C. § 153(20).

39 Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21905, 21955-58, ¶¶ 102-107 (1996) (*Non-Accounting Safeguards Order*); *Universal Service Report to Congress*, 13 FCC Rcd. at 11507-08, 11516-17, ¶¶ 13, 33.

40 For example, live operator telemessaging services are "information services" but did not meet the definition of enhanced services due to the lack of computer processing. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21956, ¶ 103.

41 *Universal Service Report to Congress*, 13 FCC Rcd at 11530, ¶ 60.

42 *Id.*

including email, web browsing, FTP clients and Usenet newsgroups, among others.[43] The Commission did not classify each service individually, however. Instead, it found that Internet service providers "do not offer separate services ... that should be deemed to have separate legal status."[44] After analyzing the functionalities available to users, the Commission determined that the service as a whole is an information service.[45] Notably, the Commission's analysis did not turn on which services the subscriber actually used. In fact, the Commission emphasized that the service provider may not know how the user is using its service, but that the usage is enabled precisely because the provider offered enhanced functionalities.

In 2002, the Commission employed a similar analysis in finding that cable modem service is an information service.[46] The Commission found that cable modem service offered a "single integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering."[47] The Commission's conclusion, moreover, applied "regardless of whether subscribers use all of the functions provided as part of the service ... and regardless of whether every cable modem service provider offers each function that could be included in the service."[48] Further, the Commission found that cable modem service did not include a separate transmission component. Instead, transmission is "part and parcel of cable modem service and is integral to its other capabilities."[49]

The Supreme Court upheld the Commission's finding of a single, integrated offering. It found that the transmission component of cable modem service is sufficiently integrated with the finished service because transmission "is necessary to providing, and is always used in connection with, a finished service."[50]

By contrast, if distinct services are "merely packaged" together or if the services are not functionally integrated, then the Commission will treat each service separately. For

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43 *Id.* at 11537-38, ¶ 76.

44 *Id.* at 11536-37, ¶ 75.

45 *Id.* at 11539-40, ¶¶ 79-81.

46 Inquiry Concerning High-Speed Access to the internet over Cable and Other Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798, 4822, ¶ 38 (2002).

47 *Id.*

48 *Id.*

49 *Id.* at 4823, ¶ 39.

50 *National Cable & Telecommunications Association v. Brand X Internet Services,* 125 S.Ct. 2688, 2705 (2005).

example, in the *Universal Service Report to Congress*, the Commission stated that if a local exchange carrier offered a package of local exchange service and voicemail, the two services would be treated as separate offerings.[51] Similarly, the Commission recently ruled in the case of menu-driven calling cards, where a user has separate options to place a telephone call, or to hear sports, weather, restaurant or entertainment information, that the services are not functionally integrated and therefore that the telephone calling capabilities are telecommunications services.[52]

In the case of audio bridging services, the service offered to end users is akin to Internet access and cable modem service. An audio bridging provider offers a variety of features and functionalities that are "part and parcel with" the underlying telecommunications used to provide the service. During an audio conference call, each participant is using telecommunications to connect to the audio bridge in order to access the features and functionalities that the bridge provides. The audio bridge provides a number of features in a single, integrated service. For example, the bridge allows users to connect to every other participant in the conference, integrating the audio channels from all other users, minus the participant's own audio, into a composite whole for each user.[53] Participants are connected only after the bridge verifies the passcode and collects user input, such as name and affiliation.[54] In addition, while connected in conference, the host can access a variety of additional features, including call recording, polling, mute/unmute and other features. In each instance, the transmission component connecting the participant to the audio bridge is "part and parcel" of the finished service that the audio bridging provider offers its end user.[55] Stated another way, transmission is "necessary to providing, and is always used in connection with, a finished service."[56]

These services are not "merely packaged" with toll-free transmission service, nor can the participant access a telecommunications service without accessing one of the finished services the provider offers. For example, it is not possible to use an audio bridge as a substitute for inbound 800 service. Calls destined to an audio bridge cannot be re-routed to a POTS

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51 *Universal Service Report to Congress,* 13 FCC Rcd at 11530, ¶ 60.

52 Regulation of Prepaid Calling Card Services, *Declaratory Ruling and Report and Order*, 21 FCC Rcd 7290, 7295-96, ¶ 15 (2006).

53 Among other things, this feature prevents two participants from talking over one another and enhances the listening experience.

54 This new information, generated on every audio conference, is available to the host during the conference. Participant dial in information is available to the host after the call for billing or recordkeeping purposes.

55 *Cable Modem Order* at ¶ 39.

56 *Brand X*, 125 S.Ct. at 4705.

number for termination. In this way, audio bridging service is different than the local exchange service/voicemail hypothetical the Commission considered in the *Universal Service Report to Congress* and different than a menu-driven calling card. As a result, if the Commission were to evaluate audio bridging service, it would do so based on the entire finished service offered by the provider, not its individual components.

B. Taken Together, Audio Conferencing Offers the "Capability for Generating, Acquiring, Storing, Transforming, Processing, Retrieving, Utilizing or Making Available Information" Via Telecommunications

When viewed as a single, integrated service, audio bridging service clearly contains the characteristics of an information service. Specifically, on each and every conference, the service provides the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available" information via telecommunications. When each participant connects to the audio bridge and enters a passcode, the bridge validates the participant information and then generates a record of the participant's date, time and originating phone number. This information is stored and made available to the host for billing purposes. In addition, each participant typically announces himself or herself, providing his or her name and affiliation. These recordings generate new information, which is stored and made available to the host during the conference call.

Further, during the conference, the host has access to additional capabilities that generate, store, transform or make available additional information. The host may choose to record some or all of the conference, thereby creating new information that can be accessed at a later time. The host also may poll participants during the conference, creating new information that also is available to the host.

Taken together, these features render an audio bridging service an information service under the Act and the Commission's rules.

* * *

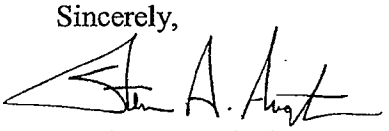
Conclusion

As an information service, audio bridging revenues are not subject to USF assessment and audio bridging providers are not required to report such revenues to USAC. For a stand alone provider such as Intercall, which does not offer other telecommunications services in addition to its audio bridging services, it is not required to register with USAC, nor is it required to file 499 Forms and contribute directly to the FUSF.

This conclusion does not mean that Intercall fails to contribute toward the preservation and advancement of universal service, however. Intercall is a significant purchaser of interstate toll-free services from multiple long distance carriers. Intercall purchases these services as an end user customer of the long distance suppliers and thus is assessed a universal service recovery charge by each of its long distance suppliers. Indeed, in Intercall's case, it pays millions of dollars annually to its carriers in universal service charges. By paying its suppliers on the telecommunications input used for its information service, Intercall fulfills its obligation to contribute toward the FUSF and complies with all FCC regulations.

Once again, we appreciate your taking the time to meet with us last week. If you have any questions about the above analysis, please feel free to contact us.

Sincerely,



Brad E. Mutschelknaus
Steven A. Augustino
Counsel to Intercall, Inc.

Exhibit 4

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DUPLICATE

October 5, 2007

RECEIVED

OCT 05 2007

USAC
Signature A. Williams

David Capozzi, Esquire
Acting General Counsel
Universal Service Administrative Company
2000 L Street, NW
Suite 200
Washington, D.C. 20036

Re: Intercall, Inc.

Dear Mr. Capozzi:

A few months ago, we met to discuss the proper method for stand alone audio bridging providers such as our client, Intercall, Inc. ("Intercall"), to contribute toward the Federal Universal Service Fund ("FUSF"). Intercall believes that under applicable FCC regulations, stand alone audio bridging providers are not obligated to register as USF contributors. Audio bridging services are not telecommunications services and they have never been regulated as a telecom service under federal law. Rather, audio bridging services offer end users the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[1] As a result, the services are information services and audio bridging providers are information service providers under the Communications Act. They properly are treated as end users by their telecommunications service providers, and therefore contribute indirectly to the federal universal service fund.

After our meeting, Intercall's parent, West Corporation ("West"), received a Letter of Inquiry from the FCC's Enforcement Bureau asking for certain information to determine whether Intercall is obligated to contribute to various telecommunications revenue-based funds, including the FUSF. West fully responded to the Bureau's inquiry in July. Recently, additional relevant information became available to West, and West today filed a letter with the FCC describing that information. We are providing a copy of this letter to you, because the information also bears on the subject of our discussions. We believe this information

[1] 47 U.S.C. § 153(20).

confirms that audio bridging providers are end users for FUSF purposes, not telecommunications carriers. Therefore, they are not required to file FCC Form 499s or to contribute to the FUSF.

If you have any questions about the enclosed, please feel free to contact us.

Sincerely,

Steven A. Augustino
Counsel to Intercall, Inc.

Enclosure

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DUPLICATE

October 5, 2007

BY HAND DELIVERY

Mr. Trent B. Harkrader
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Room 3-B443
Washington, D.C. 20554

Re: West Corporation, EB-07-IH-5212

Dear Mr. Harkrader:

On July 20, 2007, West Corporation ("West") filed a Response to the FCC Enforcement Bureau's June 20, 2007 Letter of Investigation ("LOI") to West.[1] West included a Legal Brief with its Response addressing the applicability of FCC Universal Service Fund ("USF") regulations to audio bridging services.[2] West files this letter to address new information relevant to two arguments made in the Legal Brief. First, West provides further information, recently made available to it via the Freedom of Information Act ("FOIA"), demonstrating that audio conferencing services are not required to pay USF as direct contributors. Second, West supplements its Legal Brief with a new ruling by the FCC holding that conference call service providers are end users, not carriers.

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1 Letter from Brad E. Mutschelknaus to Marlene H. Dortch, FCC, File No. EB-07-IH-5212, September 20, 2007 ("LOI Response"). West filed its response on behalf of its subsidiary, Intercall, Inc. ("Intercall"). Intercall provides audio conferencing services to resellers and the public.

2 LOI Response, Exhibit 2.

Conferencing Services are Not Subject to USF

In the Legal Brief, West explained that the audio conferencing industry has always operated in an unregulated environment.[3] West explained that it is consistent with standard practice in the audio conferencing industry for stand alone providers to pay USF indirectly as end users of toll-free telecommunications services. West identified a number of its competitors that do not file 499 Forms as carriers, including Premiere Global Services, Inc. ("Premiere"), one of its largest competitors.[4] West quoted from Premiere's SEC 10-K disclosure form, which stated:

> We believe that we operate as a provider of unregulated information services. Consequently, we do not believe that we are subject to Federal Communications Commission ("FCC") or state public utility commission regulations applicable to providers of traditional telecommunications services in the U.S.[5]

West now supplements its Response with additional information from the FCC's own records that was recently provided to West pursuant to a FOIA request. This new information confirms that West's largest competitor is conducting business consistent with West's legal interpretation, and has been doing so with the Commission's full knowledge since at least 2004. The Commission must act consistently in this instance. Just as it concluded that Premiere is not obligated to file a 499, so must the Commission conclude here that West is not subject to this telecommunications carrier obligation.

The document attached as Exhibit 1 to this letter relates to an investigation commenced by the Enforcement Bureau in 2004.[6] The subject of the investigation was Communications Network Enhancement, Inc. ("CNE"), a subsidiary of Premiere. Ed Heinen, Chief Financial Officer of CNE, forwarded to the FCC staff attorney handling the investigation a string of e-mails between CNE and NECA from June 2004 relating to CNE's filing of FCC Form 499s for USF reporting. Although partially redacted by the Commission's FOIA staff, the e-mails reveal a series of conversations between CNE and the FCC Enforcement Bureau staff, USAC, and NECA concerning CNE's obligation to file 499s. The sequence of events is outlined below:

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3 Legal Brief at 8.

4 *Id.*

5 *Id.* at 8-9.

6 *Communications Network Enhancement, Inc.*, File No. EB-04-IH-0653.

- On March 30, 2004, CNE received a letter from the FCC, in Mr. Heinen's words, "attempting to determine whether Communications Network Enhancement, Inc. should file Carriers' Form 499-A."

- Mr. Heinen contacted an unnamed FCC staff member "who instructed [CNE] to contact the National Exchange Carrier Association who in turn instructed me to contact the Universal Service Administrative Company ("USAC") to determine if CNE was subject to filing a form 499-A and if so, for assistance in completing Form 499-A."

- On June 14, 2004, Mr. Heinen contacted USAC's Data Collection Group, where he eventually was referred to NECA's Associate Manager – Revenue Administration.

- In an e-mail dated June 16, 2004, the NECA official advised CNE:

> Based upon your description below [that] "CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges" and because MCI carries the call, MCI bills you as their [redacted] and you only provide the hardware for the conference call to take place, you are not required to file the 499-A form. (Emphasis added).

- Mr. Heinen twice provided this ruling to FCC staff members. First, on June 16, 2004, Mr. Heinen forwarded the e-mail to an FCC staff attorney apparently handling the March 30, 2004 LOI.[7] Then on January 26, 2005, Mr. Heinen forwarded the same e-mail to a different FCC attorney, who was handling a new investigation docketed as File No. EB-04-IH-0653.[8] In both proceedings, the Commission closed the investigation without an order.

West submits that this information is relevant in three respects. First, it shows that USAC and NECA, the two entities primarily responsible for administering the FCC's telecommunications revenue-based funds, have interpreted the Act and the rules not to apply to audio conferencing services provided by entities like West. Second, it validates West's contention that the 2002 revision to FCC Form 499-A does not (and indeed could not) require stand alone audio conferencing providers to contribute to the FUSF as carriers. Third, the

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7 This attorney's name has been redacted from the materials produced to West.

8 This attorney's name also has been redacted from the materials produced to West.

Commission's actions preclude it from applying its USF rules to West in an enforcement context.

1. Stand alone conference call providers are not telecommunications carriers. CNE's description of its services is typical of the conference call industry. CNE (like West) does not own transmission facilities and does not offer transmission services to its customers. Instead, as CNE explained, it purchases transmission services from a telecommunications carrier (in CNE's case, MCI) as an end user. As an end user, CNE would be charged USF and other fees on the telecommunications services it purchases. CNE, like West, therefore would be an indirect contributor to USF, based on the telecommunications services it purchases form telecommunications carriers.

After considering CNE's description of its services, NECA's Associate Manager – Revenue Administration confirmed that "You [CNE] are not required to file the 499-A form." In other words, NECA, after full disclosure of the way stand alone conference call providers conduct business, confirmed that these entities do not provide telecommunications services. Importantly, NECA's advice apparently was consistent with the response CNE received from USAC's 499 Data Collection Group and was consistent with an informal opinion given by the FCC staff attorney.[9]

This confirms West's legal analysis provided in its Response. Stand alone audio conferencing providers do not offer transmission services. Instead, they provide equipment that bridges multiple calls together and provides other enhanced features. This service offered by stand alone conferencing providers is an information service under the FCC's rules. Conferencing uses telecommunications services procured as an end user from carriers but provides only an unregulated information service. Therefore, stand alone audio conferencing providers are not required to file 499 forms or contribute directly to the FUSF.

2. The 2002 Revision to the 499 Form Does Not Change this Result. As West explained in its Legal Brief, the two references to "teleconferencing" added to the 499 instructions in 2002 do not require audio conferencing providers to contribute to USF.[10] The investigation of CNE's practices and the Commission's conclusion that CNE is not obligated to file a 499 form both occurred in 2004, two years after the 499 form was revised. Neither USAC, NECA nor the FCC staff interpreted the 499 instructions to require CNE to submit a 499 form.

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9 In Mr. Heinen's e-mail to NECA, he relays a discussion with an FCC staff attorney (whose name was redacted). According to Mr. Heinen, he relayed the verbal advice CNE received to the FCC attorney and the attorney "requested that I [Mr. Heinen] send an e-mail to you and obtain a written response that I could forward to him for inclusion in CNE's FCC file." The FCC attorney apparently agreed with NECA's analysis.

10 Legal Brief at 11-19.

If the 2002 revisions required audio conferencing providers to pay USF, then NECA and the FCC certainly would have stated as much. But the Commission did not do that. To the contrary, it closed two separate investigations in 2004 and 2005 even with the language added to the 499 instructions. This contemporaneous interpretation, made well after the 2002 revisions, proves that the revisions — whatever their meaning — do not impose USF obligations on stand alone conferencing providers.

3. The CNE investigation mandates a similar result here. In 2004, the Commission investigated CNE and concluded that CNE is not a telecommunications carrier and is not obligated to file the 499 form. In 2005, the Commission opened a second investigation and again concluded that CNE is not obligated to file a 499 form. The Commission must reach the same result with respect to West. West provides substantially similar services and procures its telecommunications input in substantially the same way as did CNE. There is no reasoned basis to reach one result with respect to West's largest competitor yet reach a different result with respect to West.

The FCC Ruled that Conferencing Providers are End Users

In the Legal Brief, West argued that audio conferencing providers also are not treated as telecommunications carriers for any non-USF purposes under the Communications Act.[11] As relevant for this letter, West noted that when the Commission has encountered bridging services in its orders, it has repeatedly recognized that calls placed to a bridging provider terminate at the platform and that the company providing the bridging function is an end user customer, not a carrier.[12] West cited several instances of this, including a Declaratory Ruling issued in June 2007 concerning access charge disputes over calls placed to conference bridging providers that are terminated by certain rural LECs.[13]

Just this week, the FCC released another decision involving access charges for calls to conference bridging providers. In *Qwest v. Farmers and Merchants Mutual Telephone Company*,[14] the Commission ruled that conference bridging providers are end users under applicable interstate access tariffs. This decision confirms West's position in this proceeding that conference bridging providers are not carriers under the Communications Act.

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11 Legal Brief at 6-8.

12 *Id.* at 7.

13 *Id.*

14 *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Memorandum Opinion and Order, FCC File No. EB-07-MD-001, FCC 07-175 (rel. Oct. 2, 2007) (attached as Exhibit 2).

Qwest involved a dispute over the provision of "free conference calling" services. Qwest filed a formal complaint against Farmers and Merchants Mutual Telephone Company ("Farmers"), a rural ILEC in Wayland, Iowa. As relevant here, Qwest contended that the traffic at issue was not "terminating access" traffic as defined in Farmers' access tariff.[15] Specifically, Qwest alleged that the traffic delivered to conference calling companies does not terminate in Farmers' exchange, but instead passes through it to terminate elsewhere.[16] It also alleged that conference calling companies are not end users, and therefore delivering calls to them does not constitute terminating access service.[17] The Commission rejected both of Qwest's arguments.

With respect to Qwest's contention that the calls do not terminate in Farmers' exchange, the Commission agreed with Farmers that "users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point."[18] Each of the users' calls represent call initiation points, with the conference bridge being the termination point in each instance. The Commission cited for support the definition of "conference bridge" in Newton's Telecom Dictionary, which the Commission described as "speaking of the callers being connected by the bridge, rather than describing the bridge as routing the calls on from one caller to another."[19]

With respect to Qwest's claim that conference call providers were not end users, the Commission emphatically rejected this argument, stating:

> The record indicates ... that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with the tariff.[20]

Under Farmers' tariff, an "end user" is any customer that is not a carrier.[21] Therefore, the Commission's conclusion that conference call providers are end users necessarily also determines that conference call providers are not carriers.

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15 *Id.*

16 *Id.* at ¶ 30.

17 *Id.* at ¶ 35.

18 *Id.* at ¶ 32.

19 *Id.* at n. 113.

20 *Id.* at ¶ 35 (emphasis in original).

21 *Id.* at ¶ 36.

Qwest is directly on point and controlling in this investigation. In *Qwest*, the Commission needed to determine if conference bridging providers operate as telecommunications carriers, or as end users of telecommunications services. The Commission's decision to uphold Farmers' application of its tariff confirms that when a stand alone provider of conferencing services establishes a conference call, it is providing an unregulated bridging service to consumers. The conference call provider is not acting as a telecommunications carrier and does not provide communications services between the callers connecting to the bridge. Therefore, the Commission must follow this precedent and conclude here that West is operating as an information service provider, not as a carrier.

* * *

For the reasons stated above, and for the reasons stated in West's Response, we respectfully request that the Commission close this investigation promptly.

Sincerely,

Steven A. Augustino

SAA:pab

cc: Bill Davenport

EXHIBIT 1

[redacted]

From: Heinen, Edwin [EHeinen@conferencecallservice.com]
Sent: Wednesday, January 26, 2005 3:51 PM
To: [redacted]
Subject: RE: EB-04-IH-0653

Dear [redacted]

I have received the attached correspondence.

I am confused because I spoke with [redacted] of the FCC this summer regarding the various fees. [redacted] wasn't sure if we were liable for the fees and he instructed me to contact NECA to determine our liability. [redacted] I sent [redacted] the email dated 6/16/04 (being sent to you simultaneously) stating that we were not liable. I thought the matter was resolved and I haven't heard anything for 7 months.

Now I receive correspondence alleging that I may have violated various regulations and giving me 20 days to respond.

We are a small conferencing company which doesn't provide interstate telecommunications services and it will be very difficult to complete the requested information within the 20 days required.

I will call to discus.

Thanks,
ED Heinen
908-588-4584

-----Original Message-----
From: [redacted]
Sent: Wednesday, January 26, 2005 2:45 PM
To: Heinen, Edwin
Subject: EB-04-IH-0653

Dear Mr. Heinen:

Please confirm receipt of the attached correspondence.

Thank you.

[redacted]
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A237
Washington, D.C. 20554
202-418-2913 Direct Dial
202-418-2080 Fax
http://www.fcc.gov/eb
<<CNE LOI.1.26.05.doc>>

David Janas

From: Heinen, Edwin [EHeinen@conferencecallservice.com]
Sent: Wednesday, January 26, 2005 3:59 PM
To: [redacted]
Subject: FW: Communication Network Enhancement Inc. FCC Form 499A filing requirements

Mr. [redacted]

The following is the email I mentioned in my other email.

Thanks,
Ed Heinen

-----Original Message-----
From: Heinen, Edwin
Sent: Wednesday, June 16, 2004 4:19 PM
To: '[redacted]@fcc.gov'
Subject: FW: Communication Network Enhancement Inc. FCC Form 499A filing requirements

[redacted],

The following is an email that I sent to NECA and their response.

Ed

-----Original Message-----
From: Christy Doleshal [mailto:cdolesh@neca.org]
Sent: Wednesday, June 16, 2004 4:14 PM
To: Heinen, Edwin
Cc: Christy Doleshal
Subject: Re: Communication Network Enhancement Inc. FCC Form 499A filing requirements

Ed:

As we discussed yesterday and based upon your description below "CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges." and because MCI carries the call, MCI bills you as their [redacted], and you only provide the hardware for the conference call to take place, you are not required to file the 499-A form.

Please let me know if I can be of further assistance.

Christy Doleshal
Associate Manager-Revenue Administration
NECA
973-560-4428
973-599-6507 (fax)
E-Mail: cdolesh@neca.org

>>> "Heinen, Edwin" <EHeinen@conferencecallservice.com> 06/16/04 03:45PM
>>> >>>
Christy,

Thanks for you return call.

As I mentioned when we spoke on June 14, 2004, CNE received a letter dated March 30, 2004 from the Federal Communications Commission ("FCC") attempting to determine whether Communications Network Enhancement Inc. ("CNE") should file Carriers' Form 499-A.

<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

In May and June I spoke with the FCC who instructed me to contact the National Exchange Carrier Association who in turn instructed me to contact the Universal Service Administrative Company ("USAC") to determine if CNE was subject to filing a form 499A and if so, for assistance in completing Form 499A.

On June 14, 2004 I contacted the USAC 499 Data Collection Group (973-560-4460) and spoke with you regarding form 499A. I explained CNE's business and you stated that based on the information I provided to [redacted]. You then suggested that I contact the individuals listed on the March 30, 2004 with this information.

On that date I contacted Mr. [redacted] of the FCC [redacted] and related my conversation with you and your opininion that CNE was not subject to the Form 499A filing requirements. Though his name wasn't listed on the March 30 letter I had spoken with him in the past regarding this matter. He requested that I send an email to you and obtain a written response that I could then forward to him for inclusion in CNE's FCC file..

Therefore, the following information is being provided to enable you to determine, if based on the information contained in this email, CNE is subject to filing FCC Form 499A.

CNE, FID# 13-3311854, is located in Mountainside, New Jersey and provides conference management services to customers throughout the United States to enable them to make conference calls.

CNE provides conferencing management services to customers engaging in simple or complex audio and Internet conferencing. In simple conferencing, as few as three geographically dispersed individuals participate in a conference call (they may also view on the internet a web presentation that compliments the audio conference), and in complex conferences there may be hundreds of participants.

CNE's resources consist of its reservation and conference personnel and its bridge hardware and software. Our personnel receive the customer's requests for the date, time and anticipated duration of a conference, and the number of participants. For a typical conference call the particiant will either dial into our bridge and/or our personnel will dial out to them, obtain their names and the identification number of the particular conference, place the participants on hold until the conference starts and then place the participants in the conference call. If requested, personnel will take a roll call of participants or tape the conference. During the conference our personnel will monitor the "quaility" of the call and run "question and answer" sessions if requested. The personnel will also attempt to add on additional participants if requested to do so during a call or reconnect the participants if they become disconnected. Our bridge equipment and software performs the function of linking the participants and controlling the sound and quality of the calls to insure that all participants can be heard. Our bridge equipment does not change the form, content or composition of the call.

CNE's customers pay a fee based on the bridge management services provided (roll call, dial out, question & answer, etc), the number of participants and the minutes used. An "average" conference call has 6 participants, lasts for 45 minutes and costs the participant approximately $ .158 cents per minute per participant.

num[redacted] Approximately 80% of our participants use the toll free numbers while 20% of our participants use a local number to reach our bridge. CNE pays approximately $ .018 cents for each minute of toll free usage.

CNE provides sophisticate conferencing services and is r[redacted]

Christy, I want to thank you in advance for your assistance.

Thanks,

Ed Heinen

908-588-4584.

EXHIBIT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Qwest Communications Corporation,	)	
Complainant,	)	
v.	)	**File No. EB-07-MD-001**
Farmers and Merchants Mutual Telephone Company,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2007 **Released: October 2, 2007**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part a formal complaint[1] that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers") under section 208 of the Communications Act of 1934, as amended ("Act").[2] Qwest alleges that Farmers violated section 201(b) of the Act[3] by earning an excessive rate of return. According to Qwest, this violation resulted from Farmers' deliberate plan to increase dramatically the amount of terminating access traffic delivered to its exchange, via agreements with conference calling companies. Qwest also alleges that Farmers violated sections 203(c) and 201(b) of the Act[4] by assessing switched access charges for services that were not, in fact, switched access.

2. As explained below, we agree with Qwest that Farmers earned an excessive rate of return during the July 2005 to June 2007 period ("Complaint Period"). However, we reject Qwest's contention that the Farmers tariff then in effect should be denied "deemed lawful" status. Accordingly, Qwest may not recover damages from Farmers. In addition, we deny Qwest's claim that Farmers acted unlawfully by

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[1] Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. § 201(b).

[4] 47 U.S.C. §§ 203(c), 201(b). 47 U.S.C. § 203(c) prohibits carriers from imposing any charge not specified in their tariffs ("no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect"). 47 U.S.C. § 201(b) requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."

imposing interstate access charges for the services at issue.

II. BACKGROUND

A. The Parties

3. Qwest provides interexchange ("IXC") service, also known as long distance service, to customers throughout the United States.[5] Farmers is the incumbent local exchange carrier ("LEC") in Wayland, Iowa (population 838), serving approximately 800 access lines for local residents.[6] Farmers provides local exchange and exchange access services pursuant to tariffs filed with the Iowa Utilities Board and this Commission.[7] Qwest purchases access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[8]

B. Access Charge Regime for Small Carriers

4. The Commission regulates access charges (which are contained in federal access tariffs) that LECs apply to interstate calls.[9] To reduce the administrative costs and burdens of filing and maintaining tariffs, the Commission provides small carriers the options of utilizing tariffs administered by the National Exchange Carrier Association ("NECA") or filing their own streamlined "small-carrier" tariffs.[10] Qualifying carriers are permitted to participate in the traffic-sensitive cost and revenue pool that NECA administers on behalf of the vast majority of small telephone companies.[11] NECA files tariffed access rates that apply whenever an IXC uses any pool member's NECA-tariffed access services.[12] IXCs making payments pursuant to the NECA tariff remit them directly to the carriers providing the access service, which in turn report receipts to NECA.[13] NECA then computes final settlements due to pool members based upon the members' settlement status with NECA.[14]

5. NECA pool members may submit company-specific monthly cost data to NECA to calculate "settlements."[15] NECA pool members that choose not to file company-specific cost data operate as "average schedule" carriers and receive settlements determined via formulas proposed annually by NECA and approved by the Commission.[16] NECA develops the average schedule formulas to simulate the revenue requirements and authorized rate of return of a sample of cost companies.[17] During the Complaint Period, the prescribed rate of return for interstate switched access rates charged by rate-of-

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[5] Complaint at 4, ¶ 4; Joint Statement, File No. EB-07-MD-001 (filed June 6, 2007) ("Joint Statement") at 1, ¶ 2.

[6] Joint Statement at 1-2, ¶ 4.

[7] Joint Statement at 2, ¶ 5.

[8] Joint Statement at 1-2, ¶ 4.

[9] 47 C.F.R. §§ 69.1-69.2.

[10] Complaint at 6, ¶ 8; Answer of Farmers & Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed May 29, 2007) ("Answer") at 12, ¶ 8.

[11] *See* 47 C.F.R. §§ 69.601-69.612.

[12] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. § 69.3(d).

[13] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. §§ 69.604, 69.605.

[14] *See* 47 C.F.R. §§ 69.605, 69.606.

[15] 47 C.F.R. § 69.605(a).

[16] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9. *See* 47 C.F.R. § 69.606; *In the Matter of National Exchange Carrier Association, Inc. 2006 Modification of Average Schedules*, Order, 21 FCC Rcd 6220 (Wireline Comp. Bur. 2006).

[17] Joint Statement at 2, ¶ 7; 47 C.F.R. § 69.606(a).

return carriers was 11.25 percent.[18]

6. As an alternative to participating in the NECA pool, the Commission established an exception for carriers that want to file their own rates and are non-Bell Operating Companies with 50,000 or fewer access lines and $40 million or less in annual operating revenues.[19] These small carriers may establish individual tariff rates based on the carriers' own historical costs and demand figures.[20] Under this option, the traffic sensitive rates for average schedule carriers, which do not report monthly cost figures, are based initially on the carriers' most recent annual settlement from the NECA pool.[21] In subsequent tariffs, average schedule carriers' rates are based on the settlements the carriers would have received had they continued to participate in the NECA pool.[22] Small carriers filing tariffs under this provision remain subject to the 11.25 percent rate of return.[23]

C. Farmers' Access Tariffs and the Increase in Traffic

7. During the Complaint Period, Farmers qualified as a "small" carrier.[24] Prior to July 1, 2005, Farmers participated in the traffic-sensitive portion of NECA FCC Tariff No. 5 ("NECA Tariff").[25] Farmers thus received compensation based on the average schedule formulas approved by the Commission, and not on the basis of Farmers' actual costs, actual revenue from end users, or actual rate of return.[26]

8. Effective July 1, 2005, Farmers left the NECA pool and became an issuing carrier for Kiesling Associates LLP Tariff F.C.C. No. 5 ("Kiesling Tariff"), which is governed by Commission rule 61.39(b)(2).[27] The Kiesling Tariff contained separate switched access rates for Farmers.[28] Farmers' interstate switched access service rates were filed on 15 days notice pursuant to section 204(a)(3) of the

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[18] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7507, ¶ 1, 7532, ¶ 216, 7533, ¶ 231 (1990), *recon. granted on other grounds*, 6 FCC Rcd 7193 (1991), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993); *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15978, 15979, ¶ 3 (2004), *rev'd on other grounds, Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666 (D.C. Cir. 2006).

[19] 47 C.F.R. § 61.39; *Regulation of Small Telephone Companies*, Report and Order, 2 FCC Rcd 3811, 3812, ¶ 11 (1987) ("*Small Carrier Tariff Order*"). *See* Complaint at 8, ¶ 11; Answer at 3, ¶ 11. During the Complaint Period, carriers were required to file access tariffs at least once every two years, although they were permitted to file new tariffs more often. *See generally* 47 C.F.R. § 61.39.

[20] *See* 47 C.F.R. §§ 61.39(a), 69.602(a)(3). A carrier may also establish individual tariff rates based on the carrier's projected costs and demand under section 61.38 of the Commission's rules. 47 C.F.R. § 61.38(b).

[21] 47 C.F.R. § 61.39(b)(2)(i).

[22] 47 C.F.R. § 61.39(b)(2)(ii).

[23] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[24] Complaint at 10-11, ¶ 16; Answer at 15, ¶ 16. In addition, as the independent incumbent LEC in its serving area, Farmers was a "dominant" carrier and therefore required to file tariffs. *See* 47 C.F.R. § 61.31. The Commission has forborne from tariffing requirements for non-dominant carriers. *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Detariffing Order*, Second Report and Order, 11 FCC Rcd 20730 (1996).

[25] Joint Statement at 2, ¶ 6.

[26] Joint Statement at 2, ¶ 6.

[27] 47 C.F.R. § 61.39(b)(2). *See* Joint Statement at 3, ¶ 8. Complaint, Exhibit B, Declaration of Lisa Hensley Eckert at 8, ¶ 18 (referencing Complaint Exhibit 9, Kiesling Tariff).

[28] Complaint at 11, ¶ 18; Answer at 15, ¶ 18. *See* Joint Statement at 3, ¶ 8.

Act.[29]

9. During the time period relevant to the Complaint, Farmers entered into a number of commercial arrangements with conference calling companies as a means to increase its interstate switched access traffic and revenues.[30] Farmers, in turn, paid the companies money or other consideration in certain circumstances.[31]

10. The Complaint alleges that Farmers "pursued a *premeditated plan* to inflate its access-charge revenues by entering into agreements with [conference calling companies] resulting in vastly increased usage of Farmers' network, *at or about the same time that Farmers exited the NECA access pool.*"[32] Discovery confirmed this assertion. [Redacted confidential information regarding Farmers' business relationships with conference calling companies.]

11. As a result of these arrangements with conference calling companies, the number of minutes delivered to the Farmers exchange increased dramatically.[33] [Redacted confidential information regarding Farmers' interstate access minutes of use and bills for various months during the Complaint Period.] This sharp increase in the number of MOUs was not attributable to an increase in the number of lines serviced by Farmers, but rather to the significant amount of traffic delivered to the conference calling companies.[34]

12. Section 61.39(a) of the Commission's rules would have required Farmers to revise its tariff in June 2007 if it wanted to continue to file its own access tariff based on traffic for the two prior years (which would necessarily result in lower rates).[35] Rather than updating its individual access tariff rates pursuant to rule 61.39, however, Farmers elected to operate again as an issuing carrier in the traffic-sensitive portion of the NECA Tariff, effective June 30, 2007.[36]

D. The Complaint

13. Faced with soaring monthly access charges, Qwest ceased paying Farmers' invoices in full,[37] and it filed the Complaint with the Commission on May 2, 2007. In Count I, Qwest alleges that, beginning July 1, 2005, Farmers earned a rate of return far in excess of the prescribed maximum, and that

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[29] 47 U.S.C. § 204(a)(3); Joint Statement at 4, ¶ 10.

[30] Joint Statement at 4, ¶ 13.

[31] Joint Statement at 4, ¶ 13.

[32] Complaint at 18, ¶ 33 (emphasis added).

[33] Joint Statement at 4, ¶ 13.

[34] Joint Statement at 4, ¶ 12.

[35] 47 C.F.R. §§ 61.39(a), 61.39(b)(2)(ii); *see also Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12.

[36] Joint Statement at 5, ¶ 15. Although Farmers' individual access tariff no longer is in effect, a ruling addressing whether Farmers earned an unlawfully high rate of return through its efforts to enhance access charge revenue will provide important guidance to the telecommunications industry. *See Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, Order on Reconsideration, 15 FCC Rcd 5997, 6000, ¶ 8 (2000) (the Commission's "adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large"), *petition for review denied, Global NAPs, Inc. v. FCC*, 347 F.3d 252 (D.C. Cir. 2001). *See also MCI Telecommunications Corp. v. Southern Bell Telephone and Telegraph*, Memorandum Opinion and Order, 4 FCC Rcd 8135, 8136, ¶ 7 (1989) (holding that revision of a contested tariff did not render moot a formal complaint challenging the reasonableness of the tariff).

[37] *See* Joint Statement at 9, ¶ 35; Initial Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 ("Farmers' Opening Brief") at 13 & Exhibit J, Declaration of Rex McGuire ("McGuire Opening Brief Declaration") at 3, ¶ 7; Qwest Communication Corporation's Reply Brief, File No. EB-07-MD-001 (filed July 24, 2007) ("Qwest's Reply Brief") at 4-5 n.22.

Farmers' access rates were therefore unjust and unreasonable in violation of section 201(b) of the Act.[38] Qwest further contends that Farmers' tariff rates are not entitled to "deemed lawful" protection, because Farmers' actions "smack of a deliberate, bad-faith plan to increase dramatically Farmers' access revenues and to earn a rate of return vastly in excess of the Commission's prescription."[39] According to Qwest, Farmers' rates should be declared void *ab initio*, and Farmers should be held liable for retrospective damages in an amount to be proven during a subsequent proceeding.[40] Alternatively, Qwest contends that the traffic at issue is not "terminating access" traffic as defined in the tariff, and that Farmers violated section 203(c) (Count II) and 201(b) (Count III) of the Act, by applying charges not consistent with its tariff.[41]

III. DISCUSSION

A. Farmers' Access Rates During the Complaint Period Are Subject to Rate of Return Review.

14. Qwest argues that, during the Complaint Period, Farmers' interstate switched access rates resulted in returns exceeding the maximum allowable return for the rate category including rates for Line Termination, Intercept, Local Switching, Transport, and Information, and/or exceeding the maximum allowable return for interstate access charges overall.[42] According to Qwest, the vast increase in demand that Farmers experienced after it left the NECA pool in July 2005 and established its own tariff was not accompanied by an equivalent increase in costs.[43] In Qwest's view, this fact establishes that Farmers' interstate switched access rates exceed the authorized rate of return "many times over."[44] Qwest further contends that rates exceeding the authorized rate of return are *per se* unlawful and violate section 201(b) of the Act.[45]

15. Farmers maintains that it is not required to calculate its interstate access rates on the basis of its own costs or to calculate an individual rate of return, because it is an average schedule company.[46] According to Farmers, subjecting it to individual rate of return review is inconsistent with its average

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[38] Complaint at 20-22, ¶¶ 37-41.

[39] Complaint at 18, ¶ 33.

[40] Complaint at 22, ¶ 41. Qwest initially argued that the Commission should order Farmers to continue to offer its own tariff relying on "company specific rates reflecting recent volume figures in its new tariff, rather than reentering the NECA pool." Reply at 4. *See* Complaint at 27, ¶ 60 (asking the Commission to "direct[] Farmers to immediately amend its access tariffs to reflect its current demand and costs"). Qwest subsequently withdrew that request. Qwest's Reply Brief at 4 n.21.

[41] Complaint at 22-26, ¶¶ 42-55.

[42] Complaint at 1-2, 6, ¶ 7 & n.3, 15, ¶ 26, 20-21, ¶¶ 38-39; Complaint, Exhibit A (Legal Analysis in Support of Qwest Communications Corp.'s Complaint ["Qwest's Legal Analysis"]) at ii, 3-6, 11-17; Reply of Qwest Communications Corp., File No. EB-07-MD-001 (filed June 1, 2007) ("Reply") at 2; Qwest's Opening Brief at 9.

[43] Complaint at 2, 14-15, ¶¶ 24-26, 21, ¶ 38; Qwest's Legal Analysis at ii, 3, 12-13; Reply at 2; Qwest's Opening Brief at 7.

[44] Complaint at 21, ¶ 38; Qwest's Legal Analysis at 14.

[45] Complaint at 2, 20, ¶ 38; Qwest's Legal Analysis at 5, 7; Reply at 9; Qwest's Opening Brief at 9. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1519-20 (2007); *Virgin Islands Telephone v. FCC*, 444 F.3d 666, 669-70 (D.C. Cir. 2006); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 2005).

[46] Answer at iii, 2-3, 12, ¶ 7, 23, ¶ 39, 30, ¶ 60, 32. *See also* Answer, Exhibit E (Legal Analysis of Farmers and Merchants Mutual Telephone Company ["Farmers' Legal Analysis"]) at 7-8; Farmers' Opening Brief at 5; Farmers' Reply Brief at 7.

schedule status.[47] Farmers contends that "individual rate of return regulation" applies "to only 'companies electing to use the historical cost approach,'" and that Farmers is not such a company because it uses the "historical average schedule settlement approach set forth in Section 61.39(b)(2) [of the Commission's rules]," rather than the "historical cost approach set forth in Section 61.39(b)(1) [of the Commission's rules]."[48] Farmers also contends that, going forward, the Commission's regulatory regime will cause Farmers' rates to decline in subsequent tariff filings.[49] Thus, Farmers maintains that it has "fully complied with the authorized rate of return by calculating its access service rates on the basis of the average schedule formulas approved by the Commission to earn the authorized rate of return."[50]

16. Farmers' average schedule status does not immunize it from rate of return review. As explained above, the Commission in 1987 adopted rules permitting small carriers to establish their access rates based on the prior year's costs and demand or their NECA settlements. Those rules were designed to "reduce federal regulatory burdens on small telephone companies," while simultaneously eliminating "incentives for small companies to file access tariffs producing excessive returns."[51] To further the latter goal, the Commission clarified that small carriers "remain subject to the [established] rate of return," and that the Commission retains the right to "enforce its rate of return prescription by appropriate action, including the imposition of refunds."[52] Thus, if the use of historical figures proves not to be "rate neutral," the Commission "may request that carrier to submit the data specified by the data filing provisions in the Commission's Rules . . . to monitor that carrier's earnings."[53] This allows the Commission to "assess the need for corrective action."[54] The Commission's rules accordingly require small carriers to adhere to the prescribed rate of return and, upon request, to submit to the Commission information necessary to monitor the carrier's earnings.[55]

17. Farmers' contention that it is not a company that employs the "historical cost approach" (and, therefore, is not subject to rate of return review) is unfounded. The phrase "historical cost approach" that appears in footnote 27 of the *Small Carrier Tariff Order* refers to the Commission's

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[47] Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 5.

[48] Farmers' Opening Brief at 5 (quoting *Small Carrier Tariff Order*, 2 FCC Rcd at 3813 n.27).

[49] Answer at 18, ¶ 26.

[50] Answer at 3, 12, ¶ 7, 23, ¶ 39; Farmers' Legal Analysis at 9. *See* Answer at 16, ¶ 20, 18, ¶ 26, 22, ¶ 38. Farmers also disputes Qwest's purported contention that Farmers "should have calculated its access rates based on demand projections." Answer at 4, 24-25, ¶ 41, 32; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 7. In its Reply Brief, however, Qwest clarified its position that Farmers had three choices in the face of its plan to increase traffic volumes: "(1) remain in the NECA pool, (2) rely on projections pursuant to section 61.38, or (3) seek Commission guidance on how best to account in its filing for its knowledge that volumes were about to skyrocket." Qwest's Reply Brief at 3.

[51] *Small Carrier Tariff Order*, 2 FCC Rcd at 3811-12, ¶¶ 1, 7.

[52] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18. In 1987, the Commission could order a carrier that over-earned to pay refunds. Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are "deemed lawful." *See* discussion at paragraph 20, below. However, that does not preclude the Commission from awarding prospective relief in a complaint proceeding. *Id. See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 13 n.23 (noting that rates under a section 61.39 tariff "would, of course, be subject to challenge in a Section 208 complaint proceeding").

[53] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[54] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[55] 47 C.F.R. § 61.39(c) ("The Commission may require any carrier to submit . . . information if it deems it necessary to monitor the carrier's earnings. However, rates must be calculated based on the local exchange carrier's prescribed rate of return applicable to the period during which the rates are effective."). *See also* 47 C.F.R. § 61.38(a) (stating that the Commission may require any carrier that has submitted a tariff filing under rule 61.39 "to submit such information as may be necessary for a review of a tariff filing").

decision to allow small carriers to use historical cost figures, rather than projections, to calculate rates.[56] The Commission did not draw a distinction between cost carriers' use of historical cost figures and average schedule carriers' use of historical settlement data. Indeed, rule 61.39 discusses both types of carriers.

18. Farmers correctly notes that carriers participating in the NECA pool do not prepare cost studies and are not subject to individual rate of return scrutiny.[57] That is not the case, however, for carriers that have left the NECA pool. At that point, a carrier's receipts are not calculated pursuant to Commission-approved settlement formulas (although its prior years' settlements are used as a proxy for its costs), and its rates are subject to company-specific review. For that reason, Farmers' repeated reliance on a Commission Order approving NECA-proposed modifications to average schedule formulas is inapposite,[58] because, during the relevant period, Farmers did not participate in the NECA pool.[59]

19. The Commission has investigated and invalidated access rates charged by a carrier pursuant to a section 61.39 tariff. Specifically, in 1998, the Commission invalidated access rate increases proposed by Beehive Telephone Company, Inc. of Nevada ("Beehive"), a LEC, which had filed its own tariff under section 61.39 but had failed to demonstrate increased capital- or business-related costs.[60] The Commission found that Beehive had earned an excessive rate of return, prescribed new rates for prospective application based in part on costs for the services at issue, and ordered Beehive to pay refunds.[61] In 2002, the Commission in a section 208 complaint proceeding determined that Beehive's access rates (set under section 61.39) for a period preceding the rates at issue in the above-described tariff

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[56] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 13 ("We conclude in this Order that permitting small carriers to file access tariffs using *historical cost* and demand data to set rates appropriately reduces the regulatory burdens faced by these companies.") (emphasis added); *id.* at 3815, ¶ 33 ("We have determined in this Order that the reduction of the administrative and regulatory burdens on small telephone companies is warranted . . . The rules adopted herein reduce the frequency of required filings and provide small companies the option of choosing to file interstate access tariffs based on *historical cost* and demand data, or to participate in NECA's pooling arrangements.") (emphasis added).

[57] *See July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd 23877, 23878, ¶ 2 n.4 (2004) ("The pool revenues of average schedule companies are determined on the basis of a series of formulas . . . For qualifying small companies, the average schedule option avoids the expense of preparing cost studies.").

[58] *See* Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8 (citing *National Exchange Carrier Ass'n, Inc. Proposed Modifications to the Interstate Average Schedules*, Memorandum Opinion and Order, 8 FCC Rcd 4861, 4863, ¶ 17 (1993) (rejecting MCI's assertion regarding the possibility of overearnings by individual average schedule companies participating in the NECA pool and noting that requiring individual companies to produce a cost study "would be inconsistent with the purpose of having interstate average schedule formulas")). Farmers' reliance on the Commission's decision in the *Joint Cost Reconsideration Order* similarly is inapposite. Farmers' Legal Analysis at 7-8. *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and Their Affiliates*, Order on Reconsideration, 2 FCC Rcd 6283 (1987) ("*Joint Cost Reconsideration Order*"). There, the Commission declined to require average schedule carriers to separate their nonregulated costs from their regulated costs because it "would be a meaningless exercise, . . . would create an unnecessary regulatory burden[, and] . . . would have no resulting impact on interstate rates." *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6300, ¶ 155. In that rulemaking proceeding, the Commission was not addressing the scenario contemplated by rule 61.39(c) – promulgated that same year – where a *particular carrier's earnings* are at issue.

[59] Joint Statement at 3, ¶ 8.

[60] *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) ("*Beehive I*"), *modified on recon.*, 13 FCC Rcd 11795 (1998), *aff'd, Beehive Telephone Co., Inc. v. FCC*, 180 F.3d 314 (1999).

[61] *Beehive I*, 13 FCC Rcd at 2742-46, ¶¶ 17-26.

investigation were unjust and unreasonable.[62] The Commission found that "Beehive had earned a 15.18 percent rate of return in 1994, a 62.60 percent rate of return in 1996, and a 67.95 percent rate of return in 1996, all well above the prescribed rate of return of 11.25%."[63]

20. In addition, Farmers asserts that section 204(a)(3) of the Act (enacted in 1996) results in its tariffed access rates being "deemed lawful" as a matter of law and, therefore, that no claim for overcharges can be brought against it based on statements in the *Small Carrier Tariff Order* (released in 1987).[64] Farmers is incorrect with respect to prospective relief.[65] "[S]ection 204(a)(3) does not mean that tariff provisions that are deemed lawful when they take effect may not be found unlawful subsequently in section 205 or 208 proceedings."[66] In other words, the Commission retains its ability "to find under section 208 that a rate will be unlawful if charged in the future."[67] And, in such circumstances, the Commission "may prescribe a new rate to be effective prospectively."[68] The D.C. Circuit has upheld these principles in the context of section 208 complaint proceedings.[69] Consequently, the rate of return review discussed by the Commission in the *Small Carrier Tariff Order* is entirely consistent with a prospective review of rates deemed lawful under section 204(a)(3). Indeed, as noted above, rule 61.39(c), which provides for such review, remains intact.

B. Farmers Earned an Unlawful Rate of Return During the Complaint Period.

21. Qwest argues that Farmers earned revenues greatly in excess of the Commission-prescribed rate of return.[70] In this litigation, Farmers chose not to produce its actual cost data or a

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[62] *AT&T Corporation v. Beehive Telephone Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11641 (2002) ("*Beehive II*").

[63] *Beehive II*, 17 FCC Rcd at 11650-51, ¶ 19.

[64] Answer at iii, v, 5-6, 14, ¶ 14, 18, ¶ 26, 22, ¶ 38, 23, ¶ 39, 24, ¶ 41, 30, ¶ 60, 31; Farmers' Legal Analysis at 8-9. *See also* Farmers' Opening Brief at 3-4 (arguing that, because Farmers filed its tariff rates pursuant to section 204(a)(3) of the Act, they "are, as a matter of law, 'just and reasonable' within the meaning of 47 U.S.C. § 201(b)" and that "[e]ven a very high rate of return does not state a cognizable cause of action under Section 201(b) if the rates are just and reasonable"). Farmers disputes the relevance of the *Beehive* decisions, discussed above, on this basis, because the tariffs at issue in those cases were not filed under section 204(a)(3). Reply Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed July 24, 2007) ("Farmers' Reply Brief") at 5.

[65] *See* discussion at paragraph 27, below, regarding retrospective relief.

[66] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2183, ¶ 21 (1997) ("*Streamlined Tariff Order*").

[67] *Streamlined Tariff Order*, 12 FCC Rcd at 2183, ¶ 21 (emphasis added). *Id.* at 2182, ¶ 19 ("[W]e do not find, however, that the Commission is precluded from finding, under section 208, that a rate will be unlawful if a carrier continues to charge it during a future period or from prescribing a reasonable rate as to the future under section 205.").

[68] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Order on Reconsideration, 17 FCC Rcd 17040, 17043, ¶ 6 (2002) ("*2002 Deemed Lawful Order*").

[69] *See Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) (holding that, under the "deemed lawful" regime, "[r]emedies against carriers charging lawful rates later found unreasonable must be prospective only"); *id.* at 671 n.4 ("The Commission may still impose its own remedy for overearnings during 1998; this remedy, if any, must be prospective rather than retrospective."); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 411 (D.C. Cir. 2002) ("*ACS of Anchorage*") (holding that, even with respect to a rate deemed lawful under section 204(a)(3), prospective remedies are available if "later examination shows" the rate "to be unreasonable"). *See also 2002 Deemed Lawful Order*, 17 FCC Rcd at 17042, ¶ 6 ("The [*ACS of Anchorage*] court's holding was limited to the question of refund liability for rates that were 'deemed lawful'; it in fact acknowledged that the Commission might order prospective relief 'if a later reexamination shows them to be unreasonable.'").

[70] Qwest's Opening Brief at 11-12.

calculation of its rate of return as established by Commission rules. Instead, Farmers provided NECA settlement figures in lieu of actual cost data.[71] Consequently, to estimate Farmers' rate of return, Qwest argues that we should compare Farmers' interstate switched access bills during the Complaint Period (which represent its revenues) and Farmers' revenue requirements had it remained in the NECA pool (which Qwest argues serves as a useful surrogate for Farmers' costs plus a reasonable rate of return.)[72] [Redacted confidential information comparing Farmers' total interstate switched access bills for the Complaint Period with Farmers' aggregate traffic-sensitive revenue requirement had it remained in the NECA pool for the same period.]

22. Farmers disputes the propriety of relying on the NECA average schedule formula in assessing its rate of return.[73] According to Farmers, although average schedule carriers participating in the NECA tariff are compensated and regulated on the basis of NECA's formula,[74] these companies do not calculate a rate of return and are not required to perform the cost studies that would be necessary to calculate a rate of return.[75] As shown above, Farmers did not produce actual cost data that could be used to calculate a rate of return, but instead provided NECA settlement figures.[76] In adopting rule 61.39, the Commission recognized that average schedule formula settlements could be used by average schedule companies instead of actual costs in setting rates.[77] As such, although it might not be appropriate to compare Farmers' earnings with the results of the settlement formula when determining refund liability,[78]

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[71] As noted above, under rule 61.39(c), a carrier may be required to submit information the Commission deems necessary to monitor the carrier's earnings. 47 C.F.R. § 61.39(c). Farmers objected to providing actual cost data in response to Qwest's discovery requests. *See* Farmers & Merchants Mutual Telephone Company's Objections to Complainant's Interrogatories and Document Requests, File No. EB-07-MD-001 (filed May 14, 2007) at 7-9. Consequently, Farmers was given the option of responding to Qwest's discovery requests targeted at Farmers' costs by providing: (1) the amount that Farmers' NECA settlement would have been had Farmers participated in the NECA traffic-sensitive switched access pool for the month at issue; or (2) its actual cost and demand figures for the month at issue as a surrogate for its expenses. *See* Letter from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (dated June 14, 2007). Farmers chose option 1. *See* Farmers' Discovery Response at 3-4, Exhibit B.

[72] Qwest's Opening Brief at 14.

[73] Farmers' Reply Brief at 7-9.

[74] *See National Exchange Carrier Association, Inc. (NECA) Proposed Modifications to the 1997 Interstate Average Schedule Formulas and Proposed Further Modifications to the 1997-98 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, 13 FCC Rcd 10116, 10118, ¶ 4 (Com. Car. Bur. 1997) ("'Cost companies' settle with NECA on the basis of their actual interstate costs of service. 'Average schedule companies' use formulas to estimate the average costs of service and settle with NECA on the basis of those estimated costs. The average schedule formulas are designed to simulate the disbursements that would be received by cost companies that are representative of average schedule companies."). *See also* 47 C.F.R. § 69.606 ("Payments [to average schedule companies] shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to § 69.607 by a [cost] company that is representative of average schedule companies.").

[75] Farmers' Reply Brief at 7-8.

[76] *See* paragraph 21 *supra*.

[77] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3814, ¶ 25 (directing cost companies to base rates on a cost study but permitting average schedule companies to rely on previous years' NECA settlements as a surrogate for cost studies).

[78] We also note that the average schedule formulas never contemplated the extraordinary increases in demand brought about by arrangements such as those Farmers entered into with conference calling companies. *See In the Matter of Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 2007 WL 3416323 at 6, ¶ 9, 11, ¶¶ 24-25 (Wireline Comp. Bur. 2007) ("*2007 Access Tariff Designation Order*"). When a carrier such as Farmers experiences significant increases in its MOUs, the NECA average schedule formula likely overstates such carrier's revenue requirement and therefore understates its rate of return. *Cf. In the Matter of*

(continued ...)

such a comparison is appropriate for the limited purpose of determining whether Farmers overearned during the Complaint Period. Thus, we do not use the average schedule formula to establish a specific rate of return for Farmers.

23. Farmers does not deny that its demand during the Complaint Period far exceeded its historical demand used to calculate its individual tariff rates at the time it left the NECA pool.[79] According to Farmers, however, its revenues predictably rose as a result of increases in traffic volume. In addition, Farmers maintains that its costs also increased, to some unspecified extent.[80] Further, Farmers contends that: (1) Qwest has not properly calculated Farmers' revenue requirement (because Qwest excluded settlement amounts for common line and SS7 services);[81] (2) Qwest improperly commingled information for two different monitoring periods (*i.e.*, that any analysis of the 2005-2006 and 2007-2008 monitoring periods would have to take into account any under-earnings in 2005 and 2008, respectively);[82] and (3) Farmers' access rates are reasonable "when compared to the rates that the large price cap carriers charge for conferencing services."[83]

24. We reject Farmers' assertions. First, Qwest presented persuasive expert testimony demonstrating that Farmers' costs did not rise by nearly the same proportion as its access revenues.[84] Although Farmers submitted with its Reply Brief a declaration of its General Manager attesting that Farmers incurred greater costs as its traffic volume expanded, the declaration is not sufficiently detailed or probative to counter the specific testimony and supporting analysis presented by Qwest's expert.[85] Second, contrary to Farmers' contention, Qwest properly excluded common line and SS7-related costs from the revenue requirement, because such costs are recovered via a rate element not at issue here. In any event, excluding the costs works in Farmers' favor, because they are excluded from the total revenue figure as well. Third, Farmers gets little mileage from its contention that Qwest's calculations ought to include potential under-earnings that Farmers allegedly experienced while in the NECA pool. Farmers' earnings during the Complaint Period are subject to company-specific review. Because section 61.39

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Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking, FCC 07-176 at 12, ¶ 25 (rel. Oct. 2, 2007) (*"Access Stimulation NPRM"*) ("We tentatively conclude that the average schedule formulas can only yield reasonable estimates of an average schedule carrier's costs when the demand is within the range used to develop the formulas. When an average schedule carrier experiences a significant growth in demand that takes it outside the observed range of demand used to establish the average schedule formulas, the process of running the increased demand data through the formulas produces what appear to be extreme increases in costs for the carrier. This increase appears to be inconsistent with the efficiencies carriers would be expected to realize as access demand increases.")

[79] Farmers' Discovery Response, Exhibit A. When Farmers left the NECA pool, its individual tariff rates were calculated based upon its historical demand as calculated by the NECA settlement formula. Joint Statement at 3, ¶¶ 7-8.

[80] Farmers' Reply Brief at 8. Farmers argues, for instance, that it made "substantial investments in additional facilities," and incurred the cost of marketing fees. Farmers' Reply Brief, Exhibit A, Declaration of Rex McGuire ("McGuire Reply Brief Declaration") at 2, ¶ 4.

[81] Farmers' Reply Brief at 8 n.25.

[82] Farmers' Reply Brief at 8-9.

[83] Farmers' Opening Brief at 6-7.

[84] *See* Complaint, Exhibit C, Declaration of Peter Copeland ("Copeland Declaration"). Mr. Copeland's testimony shows that the tremendous expansion in Farmers' traffic was not accompanied by a similar increase in access lines. Copeland Declaration at 4, ¶ 7. According to Mr. Copeland, under the NECA settlement formulas, when a carrier such as Farmers experiences a substantial increase in access traffic volumes, but that increase is not accompanied by a similar rise in access line counts, its costs rise at a much slower pace than its receipts. Copeland Declaration at 13, ¶ 24.

[85] *Compare* Copeland Declaration *with* McGuire Reply Brief Declaration.

carriers are exempt from the monitoring period requirements of section 65.701 of the Commission's rules,[86] we find that the two year period that Farmers was out of the NECA traffic-sensitive pool is a reasonable time frame over which to measure and evaluate Farmers' earnings. Finally, the rates that Qwest charges for its conference calling services simply are not relevant to determinations of whether rates for Farmers' access service – an entirely different service – are just and reasonable and whether Farmers exceeded the permissible rate of return.

25. In sum, given Farmers' failure to produce actual data regarding its costs, we agree with Qwest that it is appropriate to use the results of applying the NECA average schedule formula for the purpose of determining whether Farmers overearned. Moreover, we find that Qwest persuasively has demonstrated that Farmers' revenues increased many fold during the period at issue, without a concomitant increase in costs. As a result, the conclusion that Farmers vastly exceeded the prescribed rate of return is inescapable.

C. Although Farmers Earned an Unlawful Rate of Return During the Complaint Period, Qwest Is Not Entitled to Damages.

26. Qwest asks the Commission to depart from the prohibition against awarding retrospective relief in conjunction with "deemed lawful" tariffs, because Farmers engaged in a "deliberate, bad-faith plan" to vastly increase its access revenues and earn an unlawfully high rate of return.[87] Specifically, Qwest maintains that, at the time Farmers filed new rates to be effective July 1, 2005, Farmers already had entered into a contract with a conference calling company [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company]. Qwest argues that Farmers nonetheless based its new rates on much lower historical volume figures.[88] Qwest contends that section 204(a)(3)'s "deemed lawful" provision does not apply in such circumstances, and it seeks a declaration that Farmers' tariffed rates are "void *ab initio*," thereby entitling Qwest to a damages award.[89]

27. We decline to rule as Qwest requests. As an initial matter, Qwest contends that factual statements Farmers made to the Commission in support of its tariff filing were "incorrect" and/or "misleading," in violation of Commission rule 1.17(a)(1) and (2),[90] because Farmers failed to disclose its purported plan to increase interstate access volumes.[91] Under the Commission's rules, Farmers was required to report its *historical* cost and demand figures, which the Commission determined are "likely to be a close and unbiased substitute for prospective data."[92] In fact, the Commission specifically declined to include a requirement that carriers provide *any* projected demand data or combine such future projections with historical data.[93] In this case, Farmers reported its historical data accurately. Farmers was not required to opine on whether its historical volume figures were an accurate proxy for future

[86] 47 C.F.R. § 61.39(c).

[87] Complaint at 18, ¶ 33. *See also* Complaint at 2, 18-20, ¶¶ 33-36; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16 ("Farmers achieved these grossly excessive revenues through implementation of a pre-planned, intentional scheme to abuse a perceived loophole in the Commission's rules.").

[88] Qwest's Opening Brief at 16.

[89] Complaint at 2, 22, ¶ 41, 27, ¶ 60; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16-18; Qwest's Reply Brief at 2-3.

[90] 47 C.F.R. § 1.17(a)(1), (2).

[91] Qwest's Opening Brief at 17.

[92] *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12 n.22. *See* Farmers' Reply Brief at 7 ("Section 61.39(b) of the Commission's rules does not require supporting data to be filed with the tariff, and Section 61.39(b)(2) prohibits the use of projected demand in lieu of historical demand. Farmers therefore believed that the Commission would not have been interested in the contracts that Farmers had with conferencing companies.").

[93] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶¶ 15-16.

volume figures. As it turns out, the historical data was not a good substitute for prospective data, and Farmers overearned. Under the existing rules, however, Farmers' statements are not unlawful.[94] Nor do we consider Farmers' failure to disclose its future plans to be a "case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations."[95] Although Qwest characterizes Farmers' actions as "underhanded,"[96] and we agree that Farmers manipulated the Commission's rules to achieve a result unintended by the rules, Qwest does not identify any "improper accounting techniques" employed by Farmers.[97] Finally, Qwest has not alleged that revenue-sharing arrangements between Farmers and the conference calling companies violate section 201(b) *per se*. Consequently, the prior Commission decision relied on by Qwest (finding that certain conduct by an IXC toward a competitive access provider ("CAP") was permissible when the CAP was established as a sham entity) is not dispositive.[98]

D. We Deny Farmers' Request for a Ruling Regarding Qwest's Alleged Self-Help.

28. Farmers asserts that Qwest has only made partial payments for the terminating access services Farmers provided.[99] According to Farmers, "[e]ach time that Qwest has withheld payment of Farmers's tariffed charges, it has violated Farmers's tariff and engaged in unlawful self-help."[100] Farmers asks the Commission to find that "Qwest's self-help is unlawful and a continuing violation of Sections 201(b) and 203(c) of the Act and Farmers's federal tariff."[101]

29. We decline to rule as Farmers requests. To begin, Farmers' request is tantamount to a "cross-complaint," which the Commission's formal complaint rules expressly prohibit.[102] Moreover, any complaint instituted by Farmers to recover fees allegedly owed by Qwest would constitute a "collection

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[94] We similarly see no grounds to rely on general equitable principles such as "unclean hands" to award Qwest damages. *See* Qwest's Legal Analysis at 21 ("A decision to declare Farmers's access rates void *ab initio* would also be consistent with other legal principles designed to prevent wrongdoers from relying on deception to retain ill-gotten gains."); Qwest's Opening Brief at 18 n.66 (same).

[95] Complaint at 22, ¶ 41 (citing *ACS of Anchorage*, 290 F.3d at 413); Qwest's Legal Analysis at 20 (same); Qwest's Opening Brief at 17-18 (same).

[96] Qwest's Opening Brief at 18.

[97] Although we do not grant the retrospective relief Qwest requests in his complaint proceeding, the Commission in the future will examine closely conduct that manipulates the historical volume and pricing rules and may well find that such conduct violates section 201(b) of the Act. Indeed, we currently are considering the lawfulness of such arrangements in other proceedings. *Access Stimulation NPRM.* In addition, we are considering whether payments made to the provider of a stimulating activity under such agreements may be included in a carrier's revenue requirement for purposes of setting rates. *2007 Access Tariff Designation Order* at 7, ¶¶ 13-14.

[98] Qwest's Legal Analysis at 20 (citing *Total Telecommunications Serv., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001) ("*Total v. AT&T*")). We express no view on whether a different record could have demonstrated that the deemed lawful provision does not apply or that the conduct at issue ran afoul of any other statutory provisions.

[99] Joint Statement at 9, ¶ 35; McGuire Opening Brief Declaration at 3, ¶ 7.

[100] Farmers' Opening Brief at 13. *See also* Answer at 10; Farmers' Legal Analysis at 1, 11-12.

[101] Farmers' Opening Brief at 2, 14.

[102] 47 C.F.R. § 1.725 ("Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.736. For purposes of this subpart, the term 'cross-complaint' shall include counterclaims.").

action," which the Commission repeatedly has declined to entertain.[103]

E. Farmers Did Not Violate Sections 203 or 201(b) of the Act by Imposing Terminating Access Charges on Traffic Bound for Conference Calling Companies.

30. Qwest alleges that Farmers violated sections 203 and 201(b) of the Act by imposing terminating access charges on traffic that Farmers does not, in fact, terminate.[104] Qwest argues that traffic delivered to the conference calling companies does not terminate in Farmers' exchange, but merely passes through it to terminate elsewhere.[105] We find, however, that Farmers does terminate the traffic at issue, and therefore we deny Counts II and III of the Complaint.

31. Qwest correctly notes that only a carrier whose facilities are used to originate or terminate a call may impose access charges.[106] The Commission has generally used an "end-to-end" analysis in determining where a call terminates.[107] As Qwest points out, the Commission has focused on the end points of the communications, "and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[108]

32. Qwest argues that calls to the conference calling companies are ultimately connected to – and terminate with – users in disparate locations.[109] According to Qwest, when a caller dials one of the conference calling companies' telephone numbers, the communication that he or she initiates is not with the conference calling company, but with other people who have also dialed in to the conference calling company's number.[110] Qwest argues that such calls terminate at the locations of those other callers, and that Farmers is providing a transiting service, not termination. Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point.[111] We find Farmers' characterization of the conference calling services

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[103] *See U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶ 8 (2004) (citing "long-standing Commission precedent" holding that the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts).

[104] *See* Complaint at 22-26, Counts II and III.

[105] *See* Complaint at 22-23 (arguing that imposition of terminating access charges violates sections 201(b) and 203 of the Act); Qwest's Legal Analysis at 21-30 (same); Reply at 14-19 (same). *See also* Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[106] Qwest's Legal Analysis at 21 (noting that section 3(16) of the Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of *origination or termination* of telephone toll services") (emphasis added).

[107] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic v. FCC*").

[108] *Bell Atlantic v. FCC*, 206 F.3d at 4.

[109] Complaint at 23; Qwest's Legal Analysis at 24; Reply at 14-15; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7. Qwest initially asserted that calls bound for the conference calling companies do not terminate at Farmers' exchange because at least some of the traffic "appears to be" transported to equipment owned by the conference calling companies and located outside the exchange. Qwest's Legal Analysis at 24; Reply at 14. Farmers, however, stated that the traffic at issue is all routed to conference bridges located in Farmers' exchange. McGuire Opening Brief Declaration at 3. In its Opening Brief, Qwest indicated that it was no longer relying on this point. Qwest's Opening Brief at 23 n.90.

[110] Qwest's Legal Analysis at 22; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[111] Answer at 26. Farmers' Opening Brief at 9-10.

to be more persuasive than Qwest's.[112]

33. Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the *termination* points are actually *call initiation* points. Moreover, under Qwest's theory, the exchange carriers serving B, C, and D would all be entitled to charge terminating access. In fact, each of those carriers would be entitled to charge terminating access three times – B's carrier could charge for terminating calls from A, C, and D, and so forth. This conference call with four participants would incur terminating access charges twelve times. Qwest has not addressed this logical consequence of its theory, nor has it offered any evidence that conference calls are treated as terminating with the individual callers for any purpose beyond the circumstances of this case.[113]

34. Qwest tries to analogize this case to calling card platform cases in which the Commission applied an end-to-end analysis and found that calls dialed in to a calling card platform and then routed on to another party terminated with the ultimate called party, not at the platform.[114] In other words, the Commission found that there was one call (from A to B via the calling card platform), not two (A to the platform plus platform to B). This argument is circular, however. It assumes that the calls at issue are routed on to another party, when the very issue to be decided here is whether that is the case. The calling card cases merely address the issue of whether the call terminates at the platform if, in fact, it is routed on to another party beyond the platform.[115]

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[112] The parties argue about whether Qwest would assess terminating access charges in this situation, but the record does not answer the question. According to Farmers, Qwest has admitted that it also bills terminating access for calls to a conference bridge. Farmers' Opening Brief at 2 (citing Response of Qwest Communications Corporation to Interrogatories, File No. EB-07-MD-001 (filed July 10, 2007)). Qwest, however, indicates that conference call providers generally use a different service configuration, relying on special access and 800 service, and states that Qwest has no knowledge of any end user providing a conference bridge service in the same manner as the conference calling companies that entered agreements with Farmers. Qwest Response to Interrogatory No. 1. Qwest does state that in the rare case that a conference call provider did interconnect in the same manner as the conference calling companies in this case, Qwest would assess terminating access charges. In its Reply Brief, however, Qwest says that it would do so only to the extent that it had no reason to know that its customer was a conference calling company. Qwest's Reply Brief at 7. Qwest gives no indication of what it would do if it knew that the customer was a conference calling company. Because the parties have not identified any specific instance in which Qwest actually did charge – or chose not to charge – terminating access for calls to a conference bridge, we find the record inconclusive on this point. In any event, what Qwest would hypothetically charge under similar circumstances is not dispositive here.

[113] Newton's Telecom Dictionary's definition of a "conference bridge" also seems consistent with Farmers' view, speaking of the callers being connected by the bridge, rather than describing the bridge as routing the calls on from one caller to another. Newton's describes a conference bridge as "[a] telecommunications facility or service which permits callers from several diverse locations to be connected together for a conference call." H. Newton, Newton's Telecom Dictionary, at 260 (2006).

[114] Qwest's Legal Analysis at 25-26 (citing *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005), and *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006)).

[115] We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found that it is lawful to impose access charges for the type of service at issue here. *See* Farmers' Legal Analysis at 10 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *AT&T v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001); *Beehive II*, 17 FCC Rcd at 11641). In those cases, the issue of whether access charges were appropriate was never addressed. The parties and the Commission simply assumed that the LECs involved were providing access service, and the dispute was about the lawfulness of their rates.

35. In addition to its argument about where the calls at issue terminate, Qwest also argues that Farmers' tariff does not allow Farmers to assess terminating access charges on calls to the conference calling companies. Farmers' tariff provides that terminating access service allows the customer "to terminate calls from a customer designated premises to an end user's premises."[116] Qwest asserts that the conference calling companies are not end users, and that therefore delivering calls to them does not constitute terminating access service. The record indicates, however, that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with its tariff.

36. Farmers' tariff defines "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and in turn defines "customer" as any entity "which subscribes to the services offered under this tariff."[117] Qwest asserts that the conference calling companies do not subscribe to services offered under Farmers' tariff, and are therefore neither customers nor end users. Thus, Qwest concludes, delivery of traffic to the conference calling companies cannot constitute terminating access under the tariff.

37. Farmers asserts that the conference calling companies are customers because they purchase interstate End User Access Service and pay the federal subscriber line charge.[118] Qwest, however, argues that the conference calling companies nevertheless do not "subscribe" to Farmers' services "under any meaningful definition of that term."[119] Qwest asserts that "subscription" requires the payment of money,[120] but that the conference calling companies effectively pay nothing for Farmers' service because all of their payments are refunded to them in another form – the marketing fees.

38. We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.[121] Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider.[122] For this pivotal proposition, Qwest cites nothing in the tariff itself, but only Black's Law Dictionary's definition of "subscription" as a "written contract by which one engages to . . . contribute a sum of money for a designated purpose . . . in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like."[123] Another dictionary, however, defines "subscribe" as merely "to enter one's name for a publication or service,"[124] and we note that offers of "free subscriptions" are quite common. We reject Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to

[116] Farmers' tariff incorporates the NECA tariff's terms with respect to switched access services. *See* Complaint, Exhibit 9 (Kiesling Tariff) at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 8 (NECA Tariff) at § 6.1.

[117] Complaint Exhibit 8 (NECA Tariff) at § 2.6.

[118] Complaint at vii, 27.

[119] Qwest's Legal Analysis at 27.

[120] Qwest cites only to the Black's Law Dictionary definition of "subscription" for this proposition. Qwest's Legal Analysis at 27.

[121] We express no view on whether the conduct at issue ran afoul of any other statutory provisions not raised by Qwest.

[122] Qwest complains that Farmers has not offered authority to support the alternative view, Qwest's Reply Brief at 5, but Qwest bears the burden of proof here.

[123] Qwest's Legal Analysis at 27.

[124] Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1981, p. 1152.

Farmers.[125] The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users. The record shows that the conference calling companies did subscribe, *i.e.,* enter their names for, Farmers' tariffed services.[126] Thus, the conference calling companies are both customers and end users, and Farmers' tariff therefore allows Farmers to charge terminating access charges for calls terminated to the conference calling companies.

39. Qwest has failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange, and has failed to prove that Farmers' imposition of terminating access charges is inconsistent with its tariff. We therefore deny Counts II and III of the Complaint.

IV. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Count I of the Complaint IS GRANTED IN PART and IS OTHERWISE DENIED, as discussed above.

41. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Counts II and III of the Complaint ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[125] We also note that Qwest has failed to prove that the conference calling companies do not pay Farmers for service because the marketing fees cancel out the tariff payments. Qwest cites a District Court decision concerning the filed rate doctrine to argue that the Commission must consider related transactions in analyzing the amount paid for tariffed services. *Qwest Corp. v. Public Service Comm'n of Utah*, 2006 WL 842891 (D. Utah Mar. 28, 2006) (in determining whether AT&T was paying Qwest the full tariffed rate for a private line, court considered payments from Qwest to AT&T for Qwest's occasional use of the line). As the judge in that case recognized, however, another district court reached the opposite result on the same issue. *See Qwest Corp. v. Minnesota Public Service Comm'n*, 2005 WL 1431652 (D. Minn. Mar. 31, 2005) (once AT&T leased the private line, the transaction was complete, and the tariff was no longer relevant to what price was paid for the tariffed service). Qwest offers no argument as to why we should find the Utah decision more persuasive than the Minnesota ruling.

[126] *See* Answer at vii.

Exhibit 5

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, D.C. 20007-5108

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STEVEN A. AUGUSTINO
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EMAIL: saugustino@kelleydrye.com

November 1, 2007

David Capozzi, Esquire
Acting General Counsel
Universal Service Administrative Company
2000 L Street, NW
Suite 200
Washington, D.C. 20036

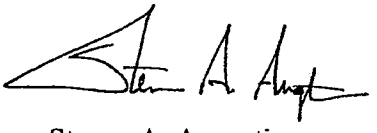
Re: Intercall, Inc.

Dear Mr. Capozzi:

On October 5, 2007, we provided, on behalf of Intercall, Inc. ("Intercall"), a copy of a letter that Intercall's parent, West Corporation ("West"), filed with the FCC. The letter demonstrated that the FCC, as well as NECA, had concluded that audio bridging services were end user services, not telecommunications services for which a retail provider would owe contributions toward the Federal Universal Service Fund ("FUSF"). Attached for your records is a further letter providing new information that bears on the same subject.

If you have any questions about the enclosed, please feel free to contact us.

Sincerely,



Steven A. Augustino
Counsel to Intercall, Inc.

Enclosure

DC01/AUGUS/315224.1

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

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DUPLICATE

November 1, 2007

BY HAND DELIVERY

Mr. Trent B. Harkrader
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Room 3-B443
Washington, D.C. 20554

Re: West Corporation, EB-07-IH-5212

Dear Mr. Harkrader:

On October 5, 2007, West Corporation ("West") submitted a letter in this proceeding supplying, inter alia, further information recently made available to it via the Freedom of Information Act ("FOIA").

In the October 5 Letter, West submitted e-mails from Mr. Ed Heinen, Chief Financial Officer of Communications Network Enhancement, Inc. ("CNE"), a subsidiary of Premiere.[1] At the time, the FOIA documents supplied to West appeared to have been redacted in several relevant passages. After further discussion with the FCC FOIA office, however, the staff attorney confirmed that some of the apparent redactions were the result of passages that were highlighted in such a way that they obscured the relevant portions of the e-mail. Although the FCC could not supply clean copies of the documents, the staff attorney supplied the missing

[1] See October 5 Letter, attached as Exhibit 1.

phrases to me in an e-mail. West, therefore, supplements its October 5 letter with this new information, which is attached as Exhibit 2 hereto.[2]

This additional information further clarifies the e-mail exchange between Mr. Heinen and Ms. Doleshal of NECA. Specifically,

- Ms. Doleshal acknowledges that MCI bills CNE as an end-user, not as a carrier;
- Ms. Doleshal (as summarized by Mr. Heinen) stated that CNE is "not subject to filing form 499A" due to its end-user status; and
- Mr. Heinen advised the FCC that, "I spoke with NECA who determined that we were not liable" for USF contributions.

West respectfully submits that these passages further confirm that stand alone conference calling providers are not responsible for USF contributions based on their bridging services.

* * *

For the reasons stated above, and for the reasons previously provided, we respectfully request that the Commission close this investigation promptly.

Sincerely,

Steven A. Augustino

SAA:pab

Attachments

cc: Bill Davenport, Assistant Bureau Chief, Enforcement Bureau

---

2 E-mail from Judy Lancaster, FCC to Steve Augustino, Kelley Drye, dated October 25, 2007. In Ms. Lancaster's e-mail, the obscured portions of the e-mails are provided as underlined text.

EXHIBIT 1

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DUPLICATE

October 5, 2007

BY HAND DELIVERY

Mr. Trent B. Harkrader
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Room 3-B443
Washington, D.C. 20554

Re: West Corporation, EB-07-IH-5212

Dear Mr. Harkrader:

On July 20, 2007, West Corporation ("West") filed a Response to the FCC Enforcement Bureau's June 20, 2007 Letter of Investigation ("LOI") to West.[1] West included a Legal Brief with its Response addressing the applicability of FCC Universal Service Fund ("USF") regulations to audio bridging services.[2] West files this letter to address new information relevant to two arguments made in the Legal Brief. First, West provides further information, recently made available to it via the Freedom of Information Act ("FOIA"), demonstrating that audio conferencing services are not required to pay USF as direct contributors. Second, West supplements its Legal Brief with a new ruling by the FCC holding that conference call service providers are end users, not carriers.

---

1 Letter from Brad E. Mutschelknaus to Marlene H. Dortch, FCC, File No. EB-07-IH-5212, September 20, 2007 ("LOI Response"). West filed its response on behalf of its subsidiary, Intercall, Inc. ("Intercall"). Intercall provides audio conferencing services to resellers and the public.

2 LOI Response, Exhibit 2.

Conferencing Services are Not Subject to USF

In the Legal Brief, West explained that the audio conferencing industry has always operated in an unregulated environment.[3] West explained that it is consistent with standard practice in the audio conferencing industry for stand alone providers to pay USF indirectly as end users of toll-free telecommunications services. West identified a number of its competitors that do not file 499 Forms as carriers, including Premiere Global Services, Inc. ("Premiere"), one of its largest competitors.[4] West quoted from Premiere's SEC 10-K disclosure form, which stated:

> We believe that we operate as a provider of unregulated information services. Consequently, we do not believe that we are subject to Federal Communications Commission ("FCC") or state public utility commission regulations applicable to providers of traditional telecommunications services in the U.S.[5]

West now supplements its Response with additional information from the FCC's own records that was recently provided to West pursuant to a FOIA request. This new information confirms that West's largest competitor is conducting business consistent with West's legal interpretation, and has been doing so with the Commission's full knowledge since at least 2004. The Commission must act consistently in this instance. Just as it concluded that Premiere is not obligated to file a 499, so must the Commission conclude here that West is not subject to this telecommunications carrier obligation.

The document attached as Exhibit 1 to this letter relates to an investigation commenced by the Enforcement Bureau in 2004.[6] The subject of the investigation was Communications Network Enhancement, Inc. ("CNE"), a subsidiary of Premiere. Ed Heinen, Chief Financial Officer of CNE, forwarded to the FCC staff attorney handling the investigation a string of e-mails between CNE and NECA from June 2004 relating to CNE's filing of FCC Form 499s for USF reporting. Although partially redacted by the Commission's FOIA staff, the e-mails reveal a series of conversations between CNE and the FCC Enforcement Bureau staff, USAC, and NECA concerning CNE's obligation to file 499s. The sequence of events is outlined below:

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3 Legal Brief at 8.

4 *Id.*

5 *Id.* at 8-9.

6 *Communications Network Enhancement, Inc.*, File No. EB-04-IH-0653.

- On March 30, 2004, CNE received a letter from the FCC, in Mr. Heinen's words, "attempting to determine whether Communications Network Enhancement, Inc. should file Carriers' Form 499-A."

- Mr. Heinen contacted an unnamed FCC staff member "who instructed [CNE] to contact the National Exchange Carrier Association who in turn instructed me to contact the Universal Service Administrative Company ("USAC") to determine if CNE was subject to filing a form 499-A and if so, for assistance in completing Form 499-A."

- On June 14, 2004, Mr. Heinen contacted USAC's Data Collection Group, where he eventually was referred to NECA's Associate Manager – Revenue Administration.

- In an e-mail dated June 16, 2004, the NECA official advised CNE:

  > Based upon your description below [that] "CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges" and because MCI carries the call, MCI bills you as their [redacted] and you only provide the hardware for the conference call to take place, you are not required to file the 499-A form. (Emphasis added).

- Mr. Heinen twice provided this ruling to FCC staff members. First, on June 16, 2004, Mr. Heinen forwarded the e-mail to an FCC staff attorney apparently handling the March 30, 2004 LOI.[7] Then on January 26, 2005, Mr. Heinen forwarded the same e-mail to a different FCC attorney, who was handling a new investigation docketed as File No. EB-04-IH-0653.[8] In both proceedings, the Commission closed the investigation without an order.

West submits that this information is relevant in three respects. First, it shows that USAC and NECA, the two entities primarily responsible for administering the FCC's telecommunications revenue-based funds, have interpreted the Act and the rules not to apply to audio conferencing services provided by entities like West. Second, it validates West's contention that the 2002 revision to FCC Form 499-A does not (and indeed could not) require stand alone audio conferencing providers to contribute to the FUSF as carriers. Third, the

---

7 This attorney's name has been redacted from the materials produced to West.

8 This attorney's name also has been redacted from the materials produced to West.

Commission's actions preclude it from applying its USF rules to West in an enforcement context.

1. Stand alone conference call providers are not telecommunications carriers. CNE's description of its services is typical of the conference call industry. CNE (like West) does not own transmission facilities and does not offer transmission services to its customers. Instead, as CNE explained, it purchases transmission services from a telecommunications carrier (in CNE's case, MCI) as an end user. As an end user, CNE would be charged USF and other fees on the telecommunications services it purchases. CNE, like West, therefore would be an indirect contributor to USF, based on the telecommunications services it purchases form telecommunications carriers.

After considering CNE's description of its services, NECA's Associate Manager – Revenue Administration confirmed that "You [CNE] are not required to file the 499-A form." In other words, NECA, after full disclosure of the way stand alone conference call providers conduct business, confirmed that these entities do not provide telecommunications services. Importantly, NECA's advice apparently was consistent with the response CNE received from USAC's 499 Data Collection Group and was consistent with an informal opinion given by the FCC staff attorney.[9]

This confirms West's legal analysis provided in its Response. Stand alone audio conferencing providers do not offer transmission services. Instead, they provide equipment that bridges multiple calls together and provides other enhanced features. This service offered by stand alone conferencing providers is an information service under the FCC's rules. Conferencing uses telecommunications services procured as an end user from carriers but provides only an unregulated information service. Therefore, stand alone audio conferencing providers are not required to file 499 forms or contribute directly to the FUSF.

2. The 2002 Revision to the 499 Form Does Not Change this Result. As West explained in its Legal Brief, the two references to "teleconferencing" added to the 499 instructions in 2002 do not require audio conferencing providers to contribute to USF.[10] The investigation of CNE's practices and the Commission's conclusion that CNE is not obligated to file a 499 form both occurred in 2004, two years after the 499 form was revised. Neither USAC, NECA nor the FCC staff interpreted the 499 instructions to require CNE to submit a 499 form.

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9 In Mr. Heinen's e-mail to NECA, he relays a discussion with an FCC staff attorney (whose name was redacted). According to Mr. Heinen, he relayed the verbal advice CNE received to the FCC attorney and the attorney "requested that I [Mr. Heinen] send an e-mail to you and obtain a written response that I could forward to him for inclusion in CNE's FCC file." The FCC attorney apparently agreed with NECA's analysis.

10 Legal Brief at 11-19.

If the 2002 revisions required audio conferencing providers to pay USF, then NECA and the FCC certainly would have stated as much. But the Commission did not do that. To the contrary, it closed two separate investigations in 2004 and 2005 even with the language added to the 499 instructions. This contemporaneous interpretation, made well after the 2002 revisions, proves that the revisions — whatever their meaning — do not impose USF obligations on stand alone conferencing providers.

3. The CNE investigation mandates a similar result here. In 2004, the Commission investigated CNE and concluded that CNE is not a telecommunications carrier and is not obligated to file the 499 form. In 2005, the Commission opened a second investigation and again concluded that CNE is not obligated to file a 499 form. The Commission must reach the same result with respect to West. West provides substantially similar services and procures its telecommunications input in substantially the same way as did CNE. There is no reasoned basis to reach one result with respect to West's largest competitor yet reach a different result with respect to West.

The FCC Ruled that Conferencing Providers are End Users

In the Legal Brief, West argued that audio conferencing providers also are not treated as telecommunications carriers for any non-USF purposes under the Communications Act.[11] As relevant for this letter, West noted that when the Commission has encountered bridging services in its orders, it has repeatedly recognized that calls placed to a bridging provider terminate at the platform and that the company providing the bridging function is an end user customer, not a carrier.[12] West cited several instances of this, including a Declaratory Ruling issued in June 2007 concerning access charge disputes over calls placed to conference bridging providers that are terminated by certain rural LECs.[13]

Just this week, the FCC released another decision involving access charges for calls to conference bridging providers. In *Qwest v. Farmers and Merchants Mutual Telephone Company*,[14] the Commission ruled that conference bridging providers are end users under applicable interstate access tariffs. This decision confirms West's position in this proceeding that conference bridging providers are not carriers under the Communications Act.

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11 Legal Brief at 6-8.

12 *Id.* at 7.

13 *Id.*

14 *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Memorandum Opinion and Order, FCC File No. EB-07-MD-001, FCC 07-175 (rel. Oct. 2, 2007) (attached as Exhibit 2).

Qwest involved a dispute over the provision of "free conference calling" services. Qwest filed a formal complaint against Farmers and Merchants Mutual Telephone Company ("Farmers"), a rural ILEC in Wayland, Iowa. As relevant here, Qwest contended that the traffic at issue was not "terminating access" traffic as defined in Farmers' access tariff.[15] Specifically, Qwest alleged that the traffic delivered to conference calling companies does not terminate in Farmers' exchange, but instead passes through it to terminate elsewhere.[16] It also alleged that conference calling companies are not end users, and therefore delivering calls to them does not constitute terminating access service.[17] The Commission rejected both of Qwest's arguments.

With respect to Qwest's contention that the calls do not terminate in Farmers' exchange, the Commission agreed with Farmers that "users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point."[18] Each of the users' calls represent call initiation points, with the conference bridge being the termination point in each instance. The Commission cited for support the definition of "conference bridge" in Newton's Telecom Dictionary, which the Commission described as "speaking of the callers being connected by the bridge, rather than describing the bridge as routing the calls on from one caller to another."[19]

With respect to Qwest's claim that conference call providers were not end users, the Commission emphatically rejected this argument, stating:

> The record indicates ... that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with the tariff.[20]

Under Farmers' tariff, an "end user" is any customer that is not a carrier.[21] Therefore, the Commission's conclusion that conference call providers are end users necessarily also determines that conference call providers are not carriers.

---

15 *Id.*

16 *Id.* at ¶ 30.

17 *Id.* at ¶ 35.

18 *Id.* at ¶ 32.

19 *Id.* at n. 113.

20 *Id.* at ¶ 35 (emphasis in original).

21 *Id.* at ¶ 36.

Qwest is directly on point and controlling in this investigation. In *Qwest*, the Commission needed to determine if conference bridging providers operate as telecommunications carriers, or as end users of telecommunications services. The Commission's decision to uphold Farmers' application of its tariff confirms that when a stand alone provider of conferencing services establishes a conference call, it is providing an unregulated bridging service to consumers. The conference call provider is not acting as a telecommunications carrier and does not provide communications services between the callers connecting to the bridge. Therefore, the Commission must follow this precedent and conclude here that West is operating as an information service provider, not as a carrier.

* * *

For the reasons stated above, and for the reasons stated in West's Response, we respectfully request that the Commission close this investigation promptly.

Sincerely,

Steven A. Augustino

SAA:pab

cc: Bill Davenport

EXHIBIT 1

[redacted]

From: Heinen, Edwin [EHeinen@conferencecallservice.com]
Sent: Wednesday, January 26, 2005 3:51 PM
To: [redacted]
Subject: RE: EB-04-IH-0653

Dear [redacted]

I have received the attached correspondence.

I am confused because I spoke with [redacted] of the FCC this summer regarding the various fees. [redacted] wasn't sure if we were liable for the fees and he instructed me to contact NECA to determine our liability. [redacted] not liable. I sent [redacted] the email dated 6/16/04 (being sent to you simultaneously) stating that we were not liable. I thought the matter was resolved and I haven't heard anything for 7 months.

Now I receive correspondence alleging that I may have violated various regulations and giving me 20 days to respond.

We are a small conferencing company which doesn't provide interstate telecommunications services and it will be very difficult to complete the requested information within the 20 days required.

I will call to discus.

Thanks,
ED Heinen
908-588-4584

-----Original Message-----
From: [redacted]
Sent: Wednesday, January 26, 2005 2:45 PM
To: Heinen, Edwin
Subject: EB-04-IH-0653

Dear Mr. Heinen:

Please confirm receipt of the attached correspondence.

Thank you.

[redacted]
Investigations & Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A237
Washington, D.C. 20554
202-418-2913 Direct Dial
202-418-2080 Fax
http://www.fcc.gov/eb
<<CNE LOI.1.26.05.doc>>

David Janas

From: Heinen, Edwin [EHeinen@conferencecallservice.com]
Sent: Wednesday, January 26, 2005 3:59 PM
To: [redacted]
Subject: FW: Communication Network Enhancement Inc. FCC Form 499A filing requirements

Mr. [redacted]

The following is the email I mentioned in my other email.

Thanks,
Ed Heinen

-----Original Message-----
From: Heinen, Edwin
Sent: Wednesday, June 16, 2004 4:19 PM
To: '[redacted]@fcc.gov'
Subject: FW: Communication Network Enhancement Inc. FCC Form 499A filing requirements

[redacted],

The following is an email that I sent to NECA and their response.

Ed

-----Original Message-----
From: Christy Doleshal [mailto:cdolesh@neca.org]
Sent: Wednesday, June 16, 2004 4:14 PM
To: Heinen, Edwin
Cc: Christy Doleshal
Subject: Re: Communication Network Enhancement Inc. FCC Form 499A filing requirements

Ed:

As we discussed yesterday and based upon your description below "CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges." and because MCI carries the call, MCI bills you as their [redacted], and you only provide the hardware for the conference call to take place, you are not required to file the 499-A form.

Please let me know if I can be of further assistance.

Christy Doleshal
Associate Manager-Revenue Administration
NECA
973-560-4428
973-599-6507 (fax)
E-Mail: cdolesh@neca.org

>>> "Heinen, Edwin" <EHeinen@conferencecallservice.com> 06/16/04 03:45PM
>>> >>>
Christy,

Thanks for you return call.

As I mentioned when we spoke on June 14, 2004, CNE received a letter dated March 30, 2004 from the Federal Communications Commission ("FCC") attempting to determine whether Communications Network Enhancement Inc. ("CNE") should file Carriers' Form 499-A.

<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

In May and June I spoke with the FCC who instructed me to contact the National Exchange Carrier Association who in turn instructed me to contact the Universal Service Administrative Company ("USAC") to determine if CNE was subject to filing a form 499A and if so, for assistance in completing Form 499A.

On June 14, 2004 I contacted the USAC 499 Data Collection Group (973-560-4460) and spoke with you regarding form 499A. I explained CNE's business and you stated that based on the information I provided to [redacted]. You then suggested that I contact the individuals listed on the March 30, 2004 with this information.

On that date I contacted Mr. [redacted] of the FCC [redacted] and related my conversation with you and your opininion that CNE was not subject to the Form 499A filing requirements. Though his name wasn't listed on the March 30 letter I had spoken with him in the past regarding this matter. He requested that I send an email to you and obtain a written response that I could then forward to him for inclusion in CNE's FCC file..

Therefore, the following information is being provided to enable you to determine, if based on the information contained in this email, CNE is subject to filing FCC Form 499A.

CNE, FID# 13-3311854, is located in Mountainside, New Jersey and provides conference management services to customers throughout the United States to enable them to make conference calls.

CNE provides conferencing management services to customers engaging in simple or complex audio and Internet conferencing. In simple conferencing, as few as three geographically dispersed individuals participate in a conference call (they may also view on the internet a web presentation that compliments the audio conference), and in complex conferences there may be hundreds of participants.

CNE's resources consist of its reservation and conference personnel and its bridge hardware and software. Our personnel receive the customer's requests for the date, time and anticipated duration of a conference, and the number of participants. For a typical conference call the particiant will either dial into our bridge and/or our personnel will dial out to them, obtain their names and the identification number of the particular conference, place the participants on hold until the conference starts and then place the participants in the conference call. If requested, personnel will take a roll call of participants or tape the conference. During the conference our personnel will monitor the "quaility" of the call and run "question and answer" sessions if requested. The personnel will also attempt to add on additional participants if requested to do so during a call or reconnect the participants if they become disconnected. Our bridge equipment and software performs the function of linking the participants and controlling the sound and quality of the calls to insure that all participants can be heard. Our bridge equipment does not change the form, content or composition of the call.

CNE's customers pay a fee based on the bridge management services provided (roll call, dial out, question & answer, etc), the number of participants and the minutes used. An "average" conference call has 6 participants, lasts for 45 minutes and costs the participant approximately $ .158 cents per minute per participant.

[redacted] Approximately 80% of our participants use the toll free numbers while 20% of our participants use a local number to reach our bridge. CNE pays approximately $ .018 cents for each minute of toll free usage.

CNE provides sophisticate conferencing services and is [redacted]

Christy, I want to thank you in advance for your assistance.

Thanks,

Ed Heinen

908-588-4584.

EXHIBIT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Qwest Communications Corporation,	)	
Complainant,	)	
v.	)	File No. EB-07-MD-001
Farmers and Merchants Mutual Telephone Company,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2007 **Released: October 2, 2007**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part a formal complaint[1] that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers") under section 208 of the Communications Act of 1934, as amended ("Act").[2] Qwest alleges that Farmers violated section 201(b) of the Act[3] by earning an excessive rate of return. According to Qwest, this violation resulted from Farmers' deliberate plan to increase dramatically the amount of terminating access traffic delivered to its exchange, via agreements with conference calling companies. Qwest also alleges that Farmers violated sections 203(c) and 201(b) of the Act[4] by assessing switched access charges for services that were not, in fact, switched access.

2. As explained below, we agree with Qwest that Farmers earned an excessive rate of return during the July 2005 to June 2007 period ("Complaint Period"). However, we reject Qwest's contention that the Farmers tariff then in effect should be denied "deemed lawful" status. Accordingly, Qwest may not recover damages from Farmers. In addition, we deny Qwest's claim that Farmers acted unlawfully by

[1] Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. § 201(b).

[4] 47 U.S.C. §§ 203(c), 201(b). 47 U.S.C. § 203(c) prohibits carriers from imposing any charge not specified in their tariffs ("no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect"). 47 U.S.C. § 201(b) requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."

imposing interstate access charges for the services at issue.

II. BACKGROUND

A. The Parties

3. Qwest provides interexchange ("IXC") service, also known as long distance service, to customers throughout the United States.[5] Farmers is the incumbent local exchange carrier ("LEC") in Wayland, Iowa (population 838), serving approximately 800 access lines for local residents.[6] Farmers provides local exchange and exchange access services pursuant to tariffs filed with the Iowa Utilities Board and this Commission.[7] Qwest purchases access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[8]

B. Access Charge Regime for Small Carriers

4. The Commission regulates access charges (which are contained in federal access tariffs) that LECs apply to interstate calls.[9] To reduce the administrative costs and burdens of filing and maintaining tariffs, the Commission provides small carriers the options of utilizing tariffs administered by the National Exchange Carrier Association ("NECA") or filing their own streamlined "small-carrier" tariffs.[10] Qualifying carriers are permitted to participate in the traffic-sensitive cost and revenue pool that NECA administers on behalf of the vast majority of small telephone companies.[11] NECA files tariffed access rates that apply whenever an IXC uses any pool member's NECA-tariffed access services.[12] IXCs making payments pursuant to the NECA tariff remit them directly to the carriers providing the access service, which in turn report receipts to NECA.[13] NECA then computes final settlements due to pool members based upon the members' settlement status with NECA.[14]

5. NECA pool members may submit company-specific monthly cost data to NECA to calculate "settlements."[15] NECA pool members that choose not to file company-specific cost data operate as "average schedule" carriers and receive settlements determined via formulas proposed annually by NECA and approved by the Commission.[16] NECA develops the average schedule formulas to simulate the revenue requirements and authorized rate of return of a sample of cost companies.[17] During the Complaint Period, the prescribed rate of return for interstate switched access rates charged by rate-of-

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[5] Complaint at 4, ¶ 4; Joint Statement, File No. EB-07-MD-001 (filed June 6, 2007) ("Joint Statement") at 1, ¶ 2.

[6] Joint Statement at 1-2, ¶ 4.

[7] Joint Statement at 2, ¶ 5.

[8] Joint Statement at 1-2, ¶ 4.

[9] 47 C.F.R. §§ 69.1-69.2.

[10] Complaint at 6, ¶ 8; Answer of Farmers & Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed May 29, 2007) ("Answer") at 12, ¶ 8.

[11] *See* 47 C.F.R. §§ 69.601-69.612.

[12] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. § 69.3(d).

[13] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. §§ 69.604, 69.605.

[14] *See* 47 C.F.R. §§ 69.605, 69.606.

[15] 47 C.F.R. § 69.605(a).

[16] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9. *See* 47 C.F.R. § 69.606; *In the Matter of National Exchange Carrier Association, Inc. 2006 Modification of Average Schedules*, Order, 21 FCC Rcd 6220 (Wireline Comp. Bur. 2006).

[17] Joint Statement at 2, ¶ 7; 47 C.F.R. § 69.606(a).

return carriers was 11.25 percent.[18]

6. As an alternative to participating in the NECA pool, the Commission established an exception for carriers that want to file their own rates and are non-Bell Operating Companies with 50,000 or fewer access lines and $40 million or less in annual operating revenues.[19] These small carriers may establish individual tariff rates based on the carriers' own historical costs and demand figures.[20] Under this option, the traffic sensitive rates for average schedule carriers, which do not report monthly cost figures, are based initially on the carriers' most recent annual settlement from the NECA pool.[21] In subsequent tariffs, average schedule carriers' rates are based on the settlements the carriers would have received had they continued to participate in the NECA pool.[22] Small carriers filing tariffs under this provision remain subject to the 11.25 percent rate of return.[23]

C. Farmers' Access Tariffs and the Increase in Traffic

7. During the Complaint Period, Farmers qualified as a "small" carrier.[24] Prior to July 1, 2005, Farmers participated in the traffic-sensitive portion of NECA FCC Tariff No. 5 ("NECA Tariff").[25] Farmers thus received compensation based on the average schedule formulas approved by the Commission, and not on the basis of Farmers' actual costs, actual revenue from end users, or actual rate of return.[26]

8. Effective July 1, 2005, Farmers left the NECA pool and became an issuing carrier for Kiesling Associates LLP Tariff F.C.C. No. 5 ("Kiesling Tariff"), which is governed by Commission rule 61.39(b)(2).[27] The Kiesling Tariff contained separate switched access rates for Farmers.[28] Farmers' interstate switched access service rates were filed on 15 days notice pursuant to section 204(a)(3) of the

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[18] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7507, ¶ 1, 7532, ¶ 216, 7533, ¶ 231 (1990), *recon. granted on other grounds*, 6 FCC Rcd 7193 (1991), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993); *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15978, 15979, ¶ 3 (2004), *rev'd on other grounds, Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666 (D.C. Cir. 2006).

[19] 47 C.F.R. § 61.39; *Regulation of Small Telephone Companies*, Report and Order, 2 FCC Rcd 3811, 3812, ¶ 11 (1987) ("*Small Carrier Tariff Order*"). *See* Complaint at 8, ¶ 11; Answer at 3, ¶ 11. During the Complaint Period, carriers were required to file access tariffs at least once every two years, although they were permitted to file new tariffs more often. *See generally* 47 C.F.R. § 61.39.

[20] *See* 47 C.F.R. §§ 61.39(a), 69.602(a)(3). A carrier may also establish individual tariff rates based on the carrier's projected costs and demand under section 61.38 of the Commission's rules. 47 C.F.R. § 61.38(b).

[21] 47 C.F.R. § 61.39(b)(2)(i).

[22] 47 C.F.R. § 61.39(b)(2)(ii).

[23] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[24] Complaint at 10-11, ¶ 16; Answer at 15, ¶ 16. In addition, as the independent incumbent LEC in its serving area, Farmers was a "dominant" carrier and therefore required to file tariffs. *See* 47 C.F.R. § 61.31. The Commission has forborne from tariffing requirements for non-dominant carriers. *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Detariffing Order*, Second Report and Order, 11 FCC Rcd 20730 (1996).

[25] Joint Statement at 2, ¶ 6.

[26] Joint Statement at 2, ¶ 6.

[27] 47 C.F.R. § 61.39(b)(2). *See* Joint Statement at 3, ¶ 8. Complaint, Exhibit B, Declaration of Lisa Hensley Eckert at 8, ¶ 18 (referencing Complaint Exhibit 9, Kiesling Tariff).

[28] Complaint at 11, ¶ 18; Answer at 15, ¶ 18. *See* Joint Statement at 3, ¶ 8.

Act.[29]

9. During the time period relevant to the Complaint, Farmers entered into a number of commercial arrangements with conference calling companies as a means to increase its interstate switched access traffic and revenues.[30] Farmers, in turn, paid the companies money or other consideration in certain circumstances.[31]

10. The Complaint alleges that Farmers "pursued a *premeditated plan* to inflate its access-charge revenues by entering into agreements with [conference calling companies] resulting in vastly increased usage of Farmers' network, *at or about the same time that Farmers exited the NECA access pool.*"[32] Discovery confirmed this assertion. [Redacted confidential information regarding Farmers' business relationships with conference calling companies.]

11. As a result of these arrangements with conference calling companies, the number of minutes delivered to the Farmers exchange increased dramatically.[33] [Redacted confidential information regarding Farmers' interstate access minutes of use and bills for various months during the Complaint Period.] This sharp increase in the number of MOUs was not attributable to an increase in the number of lines serviced by Farmers, but rather to the significant amount of traffic delivered to the conference calling companies.[34]

12. Section 61.39(a) of the Commission's rules would have required Farmers to revise its tariff in June 2007 if it wanted to continue to file its own access tariff based on traffic for the two prior years (which would necessarily result in lower rates).[35] Rather than updating its individual access tariff rates pursuant to rule 61.39, however, Farmers elected to operate again as an issuing carrier in the traffic-sensitive portion of the NECA Tariff, effective June 30, 2007.[36]

D. The Complaint

13. Faced with soaring monthly access charges, Qwest ceased paying Farmers' invoices in full,[37] and it filed the Complaint with the Commission on May 2, 2007. In Count I, Qwest alleges that, beginning July 1, 2005, Farmers earned a rate of return far in excess of the prescribed maximum, and that

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[29] 47 U.S.C. § 204(a)(3); Joint Statement at 4, ¶ 10.

[30] Joint Statement at 4, ¶ 13.

[31] Joint Statement at 4, ¶ 13.

[32] Complaint at 18, ¶ 33 (emphasis added).

[33] Joint Statement at 4, ¶ 13.

[34] Joint Statement at 4, ¶ 12.

[35] 47 C.F.R. §§ 61.39(a), 61.39(b)(2)(ii); *see also Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12.

[36] Joint Statement at 5, ¶ 15. Although Farmers' individual access tariff no longer is in effect, a ruling addressing whether Farmers earned an unlawfully high rate of return through its efforts to enhance access charge revenue will provide important guidance to the telecommunications industry. *See Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, Order on Reconsideration, 15 FCC Rcd 5997, 6000, ¶ 8 (2000) (the Commission's "adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large"), *petition for review denied, Global NAPs, Inc. v. FCC*, 347 F.3d 252 (D.C. Cir. 2001). *See also MCI Telecommunications Corp. v. Southern Bell Telephone and Telegraph*, Memorandum Opinion and Order, 4 FCC Rcd 8135, 8136, ¶ 7 (1989) (holding that revision of a contested tariff did not render moot a formal complaint challenging the reasonableness of the tariff).

[37] *See* Joint Statement at 9, ¶ 35; Initial Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 ("Farmers' Opening Brief") at 13 & Exhibit J, Declaration of Rex McGuire ("McGuire Opening Brief Declaration") at 3, ¶ 7; Qwest Communication Corporation's Reply Brief, File No. EB-07-MD-001 (filed July 24, 2007) ("Qwest's Reply Brief") at 4-5 n.22.

Farmers' access rates were therefore unjust and unreasonable in violation of section 201(b) of the Act.[38] Qwest further contends that Farmers' tariff rates are not entitled to "deemed lawful" protection, because Farmers' actions "smack of a deliberate, bad-faith plan to increase dramatically Farmers' access revenues and to earn a rate of return vastly in excess of the Commission's prescription."[39] According to Qwest, Farmers' rates should be declared void *ab initio*, and Farmers should be held liable for retrospective damages in an amount to be proven during a subsequent proceeding.[40] Alternatively, Qwest contends that the traffic at issue is not "terminating access" traffic as defined in the tariff, and that Farmers violated section 203(c) (Count II) and 201(b) (Count III) of the Act, by applying charges not consistent with its tariff.[41]

III. DISCUSSION

A. Farmers' Access Rates During the Complaint Period Are Subject to Rate of Return Review.

14. Qwest argues that, during the Complaint Period, Farmers' interstate switched access rates resulted in returns exceeding the maximum allowable return for the rate category including rates for Line Termination, Intercept, Local Switching, Transport, and Information, and/or exceeding the maximum allowable return for interstate access charges overall.[42] According to Qwest, the vast increase in demand that Farmers experienced after it left the NECA pool in July 2005 and established its own tariff was not accompanied by an equivalent increase in costs.[43] In Qwest's view, this fact establishes that Farmers' interstate switched access rates exceed the authorized rate of return "many times over."[44] Qwest further contends that rates exceeding the authorized rate of return are *per se* unlawful and violate section 201(b) of the Act.[45]

15. Farmers maintains that it is not required to calculate its interstate access rates on the basis of its own costs or to calculate an individual rate of return, because it is an average schedule company.[46] According to Farmers, subjecting it to individual rate of return review is inconsistent with its average

[38] Complaint at 20-22, ¶¶ 37-41.

[39] Complaint at 18, ¶ 33.

[40] Complaint at 22, ¶ 41. Qwest initially argued that the Commission should order Farmers to continue to offer its own tariff relying on "company specific rates reflecting recent volume figures in its new tariff, rather than reentering the NECA pool." Reply at 4. *See* Complaint at 27, ¶ 60 (asking the Commission to "direct[] Farmers to immediately amend its access tariffs to reflect its current demand and costs"). Qwest subsequently withdrew that request. Qwest's Reply Brief at 4 n.21.

[41] Complaint at 22-26, ¶¶ 42-55.

[42] Complaint at 1-2, 6, ¶ 7 & n.3, 15, ¶ 26, 20-21, ¶¶ 38-39; Complaint, Exhibit A (Legal Analysis in Support of Qwest Communications Corp.'s Complaint ["Qwest's Legal Analysis"]) at ii, 3-6, 11-17; Reply of Qwest Communications Corp., File No. EB-07-MD-001 (filed June 1, 2007) ("Reply") at 2; Qwest's Opening Brief at 9.

[43] Complaint at 2, 14-15, ¶¶ 24-26, 21, ¶ 38; Qwest's Legal Analysis at ii, 3, 12-13; Reply at 2; Qwest's Opening Brief at 7.

[44] Complaint at 21, ¶ 38; Qwest's Legal Analysis at 14.

[45] Complaint at 2, 20, ¶ 38; Qwest's Legal Analysis at 5, 7; Reply at 9; Qwest's Opening Brief at 9. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1519-20 (2007); *Virgin Islands Telephone v. FCC*, 444 F.3d 666, 669-70 (D.C. Cir. 2006); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 2005).

[46] Answer at iii, 2-3, 12, ¶ 7, 23, ¶ 39, 30, ¶ 60, 32. *See also* Answer, Exhibit E (Legal Analysis of Farmers and Merchants Mutual Telephone Company ["Farmers' Legal Analysis"]) at 7-8; Farmers' Opening Brief at 5; Farmers' Reply Brief at 7.

schedule status.[47] Farmers contends that "individual rate of return regulation" applies "to only 'companies electing to use the historical cost approach,'" and that Farmers is not such a company because it uses the "historical average schedule settlement approach set forth in Section 61.39(b)(2) [of the Commission's rules]," rather than the "historical cost approach set forth in Section 61.39(b)(1) [of the Commission's rules]."[48] Farmers also contends that, going forward, the Commission's regulatory regime will cause Farmers' rates to decline in subsequent tariff filings.[49] Thus, Farmers maintains that it has "fully complied with the authorized rate of return by calculating its access service rates on the basis of the average schedule formulas approved by the Commission to earn the authorized rate of return."[50]

16. Farmers' average schedule status does not immunize it from rate of return review. As explained above, the Commission in 1987 adopted rules permitting small carriers to establish their access rates based on the prior year's costs and demand or their NECA settlements. Those rules were designed to "reduce federal regulatory burdens on small telephone companies," while simultaneously eliminating "incentives for small companies to file access tariffs producing excessive returns."[51] To further the latter goal, the Commission clarified that small carriers "remain subject to the [established] rate of return," and that the Commission retains the right to "enforce its rate of return prescription by appropriate action, including the imposition of refunds."[52] Thus, if the use of historical figures proves not to be "rate neutral," the Commission "may request that carrier to submit the data specified by the data filing provisions in the Commission's Rules . . . to monitor that carrier's earnings."[53] This allows the Commission to "assess the need for corrective action."[54] The Commission's rules accordingly require small carriers to adhere to the prescribed rate of return and, upon request, to submit to the Commission information necessary to monitor the carrier's earnings.[55]

17. Farmers' contention that it is not a company that employs the "historical cost approach" (and, therefore, is not subject to rate of return review) is unfounded. The phrase "historical cost approach" that appears in footnote 27 of the *Small Carrier Tariff Order* refers to the Commission's

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[47] Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 5.

[48] Farmers' Opening Brief at 5 (quoting *Small Carrier Tariff Order*, 2 FCC Rcd at 3813 n.27).

[49] Answer at 18, ¶ 26.

[50] Answer at 3, 12, ¶ 7, 23, ¶ 39; Farmers' Legal Analysis at 9. *See* Answer at 16, ¶ 20, 18, ¶ 26, 22, ¶ 38. Farmers also disputes Qwest's purported contention that Farmers "should have calculated its access rates based on demand projections." Answer at 4, 24-25, ¶ 41, 32; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 7. In its Reply Brief, however, Qwest clarified its position that Farmers had three choices in the face of its plan to increase traffic volumes: "(1) remain in the NECA pool, (2) rely on projections pursuant to section 61.38, or (3) seek Commission guidance on how best to account in its filing for its knowledge that volumes were about to skyrocket." Qwest's Reply Brief at 3.

[51] *Small Carrier Tariff Order*, 2 FCC Rcd at 3811-12, ¶¶ 1, 7.

[52] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18. In 1987, the Commission could order a carrier that over-earned to pay refunds. Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are "deemed lawful." *See* discussion at paragraph 20, below. However, that does not preclude the Commission from awarding prospective relief in a complaint proceeding. *Id. See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 13 n.23 (noting that rates under a section 61.39 tariff "would, of course, be subject to challenge in a Section 208 complaint proceeding").

[53] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[54] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[55] 47 C.F.R. § 61.39(c) ("The Commission may require any carrier to submit . . . information if it deems it necessary to monitor the carrier's earnings. However, rates must be calculated based on the local exchange carrier's prescribed rate of return applicable to the period during which the rates are effective."). *See also* 47 C.F.R. § 61.38(a) (stating that the Commission may require any carrier that has submitted a tariff filing under rule 61.39 "to submit such information as may be necessary for a review of a tariff filing").

decision to allow small carriers to use historical cost figures, rather than projections, to calculate rates.[56] The Commission did not draw a distinction between cost carriers' use of historical cost figures and average schedule carriers' use of historical settlement data. Indeed, rule 61.39 discusses both types of carriers.

18. Farmers correctly notes that carriers participating in the NECA pool do not prepare cost studies and are not subject to individual rate of return scrutiny.[57] That is not the case, however, for carriers that have left the NECA pool. At that point, a carrier's receipts are not calculated pursuant to Commission-approved settlement formulas (although its prior years' settlements are used as a proxy for its costs), and its rates are subject to company-specific review. For that reason, Farmers' repeated reliance on a Commission Order approving NECA-proposed modifications to average schedule formulas is inapposite,[58] because, during the relevant period, Farmers did not participate in the NECA pool.[59]

19. The Commission has investigated and invalidated access rates charged by a carrier pursuant to a section 61.39 tariff. Specifically, in 1998, the Commission invalidated access rate increases proposed by Beehive Telephone Company, Inc. of Nevada ("Beehive"), a LEC, which had filed its own tariff under section 61.39 but had failed to demonstrate increased capital- or business-related costs.[60] The Commission found that Beehive had earned an excessive rate of return, prescribed new rates for prospective application based in part on costs for the services at issue, and ordered Beehive to pay refunds.[61] In 2002, the Commission in a section 208 complaint proceeding determined that Beehive's access rates (set under section 61.39) for a period preceding the rates at issue in the above-described tariff

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[56] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 13 ("We conclude in this Order that permitting small carriers to file access tariffs using *historical cost* and demand data to set rates appropriately reduces the regulatory burdens faced by these companies.") (emphasis added); *id.* at 3815, ¶ 33 ("We have determined in this Order that the reduction of the administrative and regulatory burdens on small telephone companies is warranted . . . The rules adopted herein reduce the frequency of required filings and provide small companies the option of choosing to file interstate access tariffs based on *historical cost* and demand data, or to participate in NECA's pooling arrangements.") (emphasis added).

[57] *See July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd 23877, 23878, ¶ 2 n.4 (2004) ("The pool revenues of average schedule companies are determined on the basis of a series of formulas . . . For qualifying small companies, the average schedule option avoids the expense of preparing cost studies.").

[58] *See* Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8 (citing *National Exchange Carrier Ass'n, Inc. Proposed Modifications to the Interstate Average Schedules*, Memorandum Opinion and Order, 8 FCC Rcd 4861, 4863, ¶ 17 (1993) (rejecting MCI's assertion regarding the possibility of overearnings by individual average schedule companies participating in the NECA pool and noting that requiring individual companies to produce a cost study "would be inconsistent with the purpose of having interstate average schedule formulas")). Farmers' reliance on the Commission's decision in the *Joint Cost Reconsideration Order* similarly is inapposite. Farmers' Legal Analysis at 7-8. *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and Their Affiliates*, Order on Reconsideration, 2 FCC Rcd 6283 (1987) ("*Joint Cost Reconsideration Order*"). There, the Commission declined to require average schedule carriers to separate their nonregulated costs from their regulated costs because it "would be a meaningless exercise, . . . would create an unnecessary regulatory burden[, and] . . . would have no resulting impact on interstate rates." *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6300, ¶ 155. In that rulemaking proceeding, the Commission was not addressing the scenario contemplated by rule 61.39(c) – promulgated that same year – where a *particular carrier's earnings* are at issue.

[59] Joint Statement at 3, ¶ 8.

[60] *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) ("*Beehive I*"), *modified on recon.*, 13 FCC Rcd 11795 (1998), *aff'd, Beehive Telephone Co., Inc. v. FCC*, 180 F.3d 314 (1999).

[61] *Beehive I*, 13 FCC Rcd at 2742-46, ¶¶ 17-26.

investigation were unjust and unreasonable.[62] The Commission found that "Beehive had earned a 15.18 percent rate of return in 1994, a 62.60 percent rate of return in 1996, and a 67.95 percent rate of return in 1996, all well above the prescribed rate of return of 11.25%."[63]

20. In addition, Farmers asserts that section 204(a)(3) of the Act (enacted in 1996) results in its tariffed access rates being "deemed lawful" as a matter of law and, therefore, that no claim for overcharges can be brought against it based on statements in the *Small Carrier Tariff Order* (released in 1987).[64] Farmers is incorrect with respect to prospective relief.[65] "[S]ection 204(a)(3) does not mean that tariff provisions that are deemed lawful when they take effect may not be found unlawful subsequently in section 205 or 208 proceedings."[66] In other words, the Commission retains its ability "to find under section 208 that a rate will be unlawful if charged in the future."[67] And, in such circumstances, the Commission "may prescribe a new rate to be effective prospectively."[68] The D.C. Circuit has upheld these principles in the context of section 208 complaint proceedings.[69] Consequently, the rate of return review discussed by the Commission in the *Small Carrier Tariff Order* is entirely consistent with a prospective review of rates deemed lawful under section 204(a)(3). Indeed, as noted above, rule 61.39(c), which provides for such review, remains intact.

B. Farmers Earned an Unlawful Rate of Return During the Complaint Period.

21. Qwest argues that Farmers earned revenues greatly in excess of the Commission-prescribed rate of return.[70] In this litigation, Farmers chose not to produce its actual cost data or a

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[62] *AT&T Corporation v. Beehive Telephone Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11641 (2002) ("*Beehive II*").

[63] *Beehive II*, 17 FCC Rcd at 11650-51, ¶ 19.

[64] Answer at iii, v, 5-6, 14, ¶ 14, 18, ¶ 26, 22, ¶ 38, 23, ¶ 39, 24, ¶ 41, 30, ¶ 60, 31; Farmers' Legal Analysis at 8-9. *See also* Farmers' Opening Brief at 3-4 (arguing that, because Farmers filed its tariff rates pursuant to section 204(a)(3) of the Act, they "are, as a matter of law, 'just and reasonable' within the meaning of 47 U.S.C. § 201(b)" and that "[e]ven a very high rate of return does not state a cognizable cause of action under Section 201(b) if the rates are just and reasonable"). Farmers disputes the relevance of the *Beehive* decisions, discussed above, on this basis, because the tariffs at issue in those cases were not filed under section 204(a)(3). Reply Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed July 24, 2007) ("Farmers' Reply Brief") at 5.

[65] *See* discussion at paragraph 27, below, regarding retrospective relief.

[66] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2183, ¶ 21 (1997) ("*Streamlined Tariff Order*").

[67] *Streamlined Tariff Order*, 12 FCC Rcd at 2183, ¶ 21 (emphasis added). *Id.* at 2182, ¶ 19 ("[W]e do not find, however, that the Commission is precluded from finding, under section 208, that a rate will be unlawful if a carrier continues to charge it during a future period or from prescribing a reasonable rate as to the future under section 205.").

[68] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Order on Reconsideration, 17 FCC Rcd 17040, 17043, ¶ 6 (2002) ("*2002 Deemed Lawful Order*").

[69] *See Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) (holding that, under the "deemed lawful" regime, "[r]emedies against carriers charging lawful rates later found unreasonable must be prospective only"); *id.* at 671 n.4 ("The Commission may still impose its own remedy for overearnings during 1998; this remedy, if any, must be prospective rather than retrospective."); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 411 (D.C. Cir. 2002) ("*ACS of Anchorage*") (holding that, even with respect to a rate deemed lawful under section 204(a)(3), prospective remedies are available if "later examination shows" the rate "to be unreasonable"). *See also 2002 Deemed Lawful Order*, 17 FCC Rcd at 17042, ¶ 6 ("The [*ACS of Anchorage*] court's holding was limited to the question of refund liability for rates that were 'deemed lawful'; it in fact acknowledged that the Commission might order prospective relief 'if a later reexamination shows them to be unreasonable.'").

[70] Qwest's Opening Brief at 11-12.

calculation of its rate of return as established by Commission rules. Instead, Farmers provided NECA settlement figures in lieu of actual cost data.[71] Consequently, to estimate Farmers' rate of return, Qwest argues that we should compare Farmers' interstate switched access bills during the Complaint Period (which represent its revenues) and Farmers' revenue requirements had it remained in the NECA pool (which Qwest argues serves as a useful surrogate for Farmers' costs plus a reasonable rate of return.)[72] [Redacted confidential information comparing Farmers' total interstate switched access bills for the Complaint Period with Farmers' aggregate traffic-sensitive revenue requirement had it remained in the NECA pool for the same period.]

22. Farmers disputes the propriety of relying on the NECA average schedule formula in assessing its rate of return.[73] According to Farmers, although average schedule carriers participating in the NECA tariff are compensated and regulated on the basis of NECA's formula,[74] these companies do not calculate a rate of return and are not required to perform the cost studies that would be necessary to calculate a rate of return.[75] As shown above, Farmers did not produce actual cost data that could be used to calculate a rate of return, but instead provided NECA settlement figures.[76] In adopting rule 61.39, the Commission recognized that average schedule formula settlements could be used by average schedule companies instead of actual costs in setting rates.[77] As such, although it might not be appropriate to compare Farmers' earnings with the results of the settlement formula when determining refund liability,[78]

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[71] As noted above, under rule 61.39(c), a carrier may be required to submit information the Commission deems necessary to monitor the carrier's earnings. 47 C.F.R. § 61.39(c). Farmers objected to providing actual cost data in response to Qwest's discovery requests. *See* Farmers & Merchants Mutual Telephone Company's Objections to Complainant's Interrogatories and Document Requests, File No. EB-07-MD-001 (filed May 14, 2007) at 7-9. Consequently, Farmers was given the option of responding to Qwest's discovery requests targeted at Farmers' costs by providing: (1) the amount that Farmers' NECA settlement would have been had Farmers participated in the NECA traffic-sensitive switched access pool for the month at issue; or (2) its actual cost and demand figures for the month at issue as a surrogate for its expenses. *See* Letter from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (dated June 14, 2007). Farmers chose option 1. *See* Farmers' Discovery Response at 3-4, Exhibit B.

[72] Qwest's Opening Brief at 14.

[73] Farmers' Reply Brief at 7-9.

[74] *See National Exchange Carrier Association, Inc. (NECA) Proposed Modifications to the 1997 Interstate Average Schedule Formulas and Proposed Further Modifications to the 1997-98 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, 13 FCC Rcd 10116, 10118, ¶ 4 (Com. Car. Bur. 1997) ("'Cost companies' settle with NECA on the basis of their actual interstate costs of service. 'Average schedule companies' use formulas to estimate the average costs of service and settle with NECA on the basis of those estimated costs. The average schedule formulas are designed to simulate the disbursements that would be received by cost companies that are representative of average schedule companies."). *See also* 47 C.F.R. § 69.606 ("Payments [to average schedule companies] shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to § 69.607 by a [cost] company that is representative of average schedule companies.").

[75] Farmers' Reply Brief at 7-8.

[76] *See* paragraph 21 *supra*.

[77] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3814, ¶ 25 (directing cost companies to base rates on a cost study but permitting average schedule companies to rely on previous years' NECA settlements as a surrogate for cost studies).

[78] We also note that the average schedule formulas never contemplated the extraordinary increases in demand brought about by arrangements such as those Farmers entered into with conference calling companies. *See In the Matter of Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 2007 WL 3416323 at 6, ¶ 9, 11, ¶¶ 24-25 (Wireline Comp. Bur. 2007) ("*2007 Access Tariff Designation Order*"). When a carrier such as Farmers experiences significant increases in its MOUs, the NECA average schedule formula likely overstates such carrier's revenue requirement and therefore understates its rate of return. *Cf. In the Matter of*

(continued ...)

such a comparison is appropriate for the limited purpose of determining whether Farmers overearned during the Complaint Period. Thus, we do not use the average schedule formula to establish a specific rate of return for Farmers.

23. Farmers does not deny that its demand during the Complaint Period far exceeded its historical demand used to calculate its individual tariff rates at the time it left the NECA pool.[79] According to Farmers, however, its revenues predictably rose as a result of increases in traffic volume. In addition, Farmers maintains that its costs also increased, to some unspecified extent.[80] Further, Farmers contends that: (1) Qwest has not properly calculated Farmers' revenue requirement (because Qwest excluded settlement amounts for common line and SS7 services);[81] (2) Qwest improperly commingled information for two different monitoring periods (*i.e.*, that any analysis of the 2005-2006 and 2007-2008 monitoring periods would have to take into account any under-earnings in 2005 and 2008, respectively);[82] and (3) Farmers' access rates are reasonable "when compared to the rates that the large price cap carriers charge for conferencing services."[83]

24. We reject Farmers' assertions. First, Qwest presented persuasive expert testimony demonstrating that Farmers' costs did not rise by nearly the same proportion as its access revenues.[84] Although Farmers submitted with its Reply Brief a declaration of its General Manager attesting that Farmers incurred greater costs as its traffic volume expanded, the declaration is not sufficiently detailed or probative to counter the specific testimony and supporting analysis presented by Qwest's expert.[85] Second, contrary to Farmers' contention, Qwest properly excluded common line and SS7-related costs from the revenue requirement, because such costs are recovered via a rate element not at issue here. In any event, excluding the costs works in Farmers' favor, because they are excluded from the total revenue figure as well. Third, Farmers gets little mileage from its contention that Qwest's calculations ought to include potential under-earnings that Farmers allegedly experienced while in the NECA pool. Farmers' earnings during the Complaint Period are subject to company-specific review. Because section 61.39

(Continued from previous page)
Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking, FCC 07-176 at 12, ¶ 25 (rel. Oct. 2, 2007) ("*Access Stimulation NPRM*") ("We tentatively conclude that the average schedule formulas can only yield reasonable estimates of an average schedule carrier's costs when the demand is within the range used to develop the formulas. When an average schedule carrier experiences a significant growth in demand that takes it outside the observed range of demand used to establish the average schedule formulas, the process of running the increased demand data through the formulas produces what appear to be extreme increases in costs for the carrier. This increase appears to be inconsistent with the efficiencies carriers would be expected to realize as access demand increases.")

[79] Farmers' Discovery Response, Exhibit A. When Farmers left the NECA pool, its individual tariff rates were calculated based upon its historical demand as calculated by the NECA settlement formula. Joint Statement at 3, ¶¶ 7-8.

[80] Farmers' Reply Brief at 8. Farmers argues, for instance, that it made "substantial investments in additional facilities," and incurred the cost of marketing fees. Farmers' Reply Brief, Exhibit A, Declaration of Rex McGuire ("McGuire Reply Brief Declaration") at 2, ¶ 4.

[81] Farmers' Reply Brief at 8 n.25.

[82] Farmers' Reply Brief at 8-9.

[83] Farmers' Opening Brief at 6-7.

[84] *See* Complaint, Exhibit C, Declaration of Peter Copeland ("Copeland Declaration"). Mr. Copeland's testimony shows that the tremendous expansion in Farmers' traffic was not accompanied by a similar increase in access lines. Copeland Declaration at 4, ¶ 7. According to Mr. Copeland, under the NECA settlement formulas, when a carrier such as Farmers experiences a substantial increase in access traffic volumes, but that increase is not accompanied by a similar rise in access line counts, its costs rise at a much slower pace than its receipts. Copeland Declaration at 13, ¶ 24.

[85] *Compare* Copeland Declaration *with* McGuire Reply Brief Declaration.

carriers are exempt from the monitoring period requirements of section 65.701 of the Commission's rules,[86] we find that the two year period that Farmers was out of the NECA traffic-sensitive pool is a reasonable time frame over which to measure and evaluate Farmers' earnings. Finally, the rates that Qwest charges for its conference calling services simply are not relevant to determinations of whether rates for Farmers' access service – an entirely different service – are just and reasonable and whether Farmers exceeded the permissible rate of return.

25. In sum, given Farmers' failure to produce actual data regarding its costs, we agree with Qwest that it is appropriate to use the results of applying the NECA average schedule formula for the purpose of determining whether Farmers overearned. Moreover, we find that Qwest persuasively has demonstrated that Farmers' revenues increased many fold during the period at issue, without a concomitant increase in costs. As a result, the conclusion that Farmers vastly exceeded the prescribed rate of return is inescapable.

C. Although Farmers Earned an Unlawful Rate of Return During the Complaint Period, Qwest Is Not Entitled to Damages.

26. Qwest asks the Commission to depart from the prohibition against awarding retrospective relief in conjunction with "deemed lawful" tariffs, because Farmers engaged in a "deliberate, bad-faith plan" to vastly increase its access revenues and earn an unlawfully high rate of return.[87] Specifically, Qwest maintains that, at the time Farmers filed new rates to be effective July 1, 2005, Farmers already had entered into a contract with a conference calling company [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company]. Qwest argues that Farmers nonetheless based its new rates on much lower historical volume figures.[88] Qwest contends that section 204(a)(3)'s "deemed lawful" provision does not apply in such circumstances, and it seeks a declaration that Farmers' tariffed rates are "void *ab initio*," thereby entitling Qwest to a damages award.[89]

27. We decline to rule as Qwest requests. As an initial matter, Qwest contends that factual statements Farmers made to the Commission in support of its tariff filing were "incorrect" and/or "misleading," in violation of Commission rule 1.17(a)(1) and (2),[90] because Farmers failed to disclose its purported plan to increase interstate access volumes.[91] Under the Commission's rules, Farmers was required to report its *historical* cost and demand figures, which the Commission determined are "likely to be a close and unbiased substitute for prospective data."[92] In fact, the Commission specifically declined to include a requirement that carriers provide *any* projected demand data or combine such future projections with historical data.[93] In this case, Farmers reported its historical data accurately. Farmers was not required to opine on whether its historical volume figures were an accurate proxy for future

[86] 47 C.F.R. § 61.39(c).

[87] Complaint at 18, ¶ 33. *See also* Complaint at 2, 18-20, ¶¶ 33-36; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16 ("Farmers achieved these grossly excessive revenues through implementation of a pre-planned, intentional scheme to abuse a perceived loophole in the Commission's rules.").

[88] Qwest's Opening Brief at 16.

[89] Complaint at 2, 22, ¶ 41, 27, ¶ 60; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16-18; Qwest's Reply Brief at 2-3.

[90] 47 C.F.R. § 1.17(a)(1), (2).

[91] Qwest's Opening Brief at 17.

[92] *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12 n.22. *See* Farmers' Reply Brief at 7 ("Section 61.39(b) of the Commission's rules does not require supporting data to be filed with the tariff, and Section 61.39(b)(2) prohibits the use of projected demand in lieu of historical demand. Farmers therefore believed that the Commission would not have been interested in the contracts that Farmers had with conferencing companies.").

[93] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶¶ 15-16.

volume figures. As it turns out, the historical data was not a good substitute for prospective data, and Farmers overearned. Under the existing rules, however, Farmers' statements are not unlawful.[94] Nor do we consider Farmers' failure to disclose its future plans to be a "case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations."[95] Although Qwest characterizes Farmers' actions as "underhanded,"[96] and we agree that Farmers manipulated the Commission's rules to achieve a result unintended by the rules, Qwest does not identify any "improper accounting techniques" employed by Farmers.[97] Finally, Qwest has not alleged that revenue-sharing arrangements between Farmers and the conference calling companies violate section 201(b) *per se*. Consequently, the prior Commission decision relied on by Qwest (finding that certain conduct by an IXC toward a competitive access provider ("CAP") was permissible when the CAP was established as a sham entity) is not dispositive.[98]

D. We Deny Farmers' Request for a Ruling Regarding Qwest's Alleged Self-Help.

28. Farmers asserts that Qwest has only made partial payments for the terminating access services Farmers provided.[99] According to Farmers, "[e]ach time that Qwest has withheld payment of Farmers's tariffed charges, it has violated Farmers's tariff and engaged in unlawful self-help."[100] Farmers asks the Commission to find that "Qwest's self-help is unlawful and a continuing violation of Sections 201(b) and 203(c) of the Act and Farmers's federal tariff."[101]

29. We decline to rule as Farmers requests. To begin, Farmers' request is tantamount to a "cross-complaint," which the Commission's formal complaint rules expressly prohibit.[102] Moreover, any complaint instituted by Farmers to recover fees allegedly owed by Qwest would constitute a "collection

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[94] We similarly see no grounds to rely on general equitable principles such as "unclean hands" to award Qwest damages. *See* Qwest's Legal Analysis at 21 ("A decision to declare Farmers's access rates void *ab initio* would also be consistent with other legal principles designed to prevent wrongdoers from relying on deception to retain ill-gotten gains."); Qwest's Opening Brief at 18 n.66 (same).

[95] Complaint at 22, ¶ 41 (citing *ACS of Anchorage*, 290 F.3d at 413); Qwest's Legal Analysis at 20 (same); Qwest's Opening Brief at 17-18 (same).

[96] Qwest's Opening Brief at 18.

[97] Although we do not grant the retrospective relief Qwest requests in his complaint proceeding, the Commission in the future will examine closely conduct that manipulates the historical volume and pricing rules and may well find that such conduct violates section 201(b) of the Act. Indeed, we currently are considering the lawfulness of such arrangements in other proceedings. *Access Stimulation NPRM*. In addition, we are considering whether payments made to the provider of a stimulating activity under such agreements may be included in a carrier's revenue requirement for purposes of setting rates. *2007 Access Tariff Designation Order* at 7, ¶¶ 13-14.

[98] Qwest's Legal Analysis at 20 (citing *Total Telecommunications Serv., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001) ("*Total v. AT&T*")). We express no view on whether a different record could have demonstrated that the deemed lawful provision does not apply or that the conduct at issue ran afoul of any other statutory provisions.

[99] Joint Statement at 9, ¶ 35; McGuire Opening Brief Declaration at 3, ¶ 7.

[100] Farmers' Opening Brief at 13. *See also* Answer at 10; Farmers' Legal Analysis at 1, 11-12.

[101] Farmers' Opening Brief at 2, 14.

[102] 47 C.F.R. § 1.725 ("Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.736. For purposes of this subpart, the term 'cross-complaint' shall include counterclaims.").

action," which the Commission repeatedly has declined to entertain.[103]

E. Farmers Did Not Violate Sections 203 or 201(b) of the Act by Imposing Terminating Access Charges on Traffic Bound for Conference Calling Companies.

30. Qwest alleges that Farmers violated sections 203 and 201(b) of the Act by imposing terminating access charges on traffic that Farmers does not, in fact, terminate.[104] Qwest argues that traffic delivered to the conference calling companies does not terminate in Farmers' exchange, but merely passes through it to terminate elsewhere.[105] We find, however, that Farmers does terminate the traffic at issue, and therefore we deny Counts II and III of the Complaint.

31. Qwest correctly notes that only a carrier whose facilities are used to originate or terminate a call may impose access charges.[106] The Commission has generally used an "end-to-end" analysis in determining where a call terminates.[107] As Qwest points out, the Commission has focused on the end points of the communications, "and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[108]

32. Qwest argues that calls to the conference calling companies are ultimately connected to – and terminate with – users in disparate locations.[109] According to Qwest, when a caller dials one of the conference calling companies' telephone numbers, the communication that he or she initiates is not with the conference calling company, but with other people who have also dialed in to the conference calling company's number.[110] Qwest argues that such calls terminate at the locations of those other callers, and that Farmers is providing a transiting service, not termination. Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point.[111] We find Farmers' characterization of the conference calling services

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[103] *See U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶ 8 (2004) (citing "long-standing Commission precedent" holding that the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts).

[104] *See* Complaint at 22-26, Counts II and III.

[105] *See* Complaint at 22-23 (arguing that imposition of terminating access charges violates sections 201(b) and 203 of the Act); Qwest's Legal Analysis at 21-30 (same); Reply at 14-19 (same). *See also* Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[106] Qwest's Legal Analysis at 21 (noting that section 3(16) of the Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of *origination or termination* of telephone toll services") (emphasis added).

[107] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic v. FCC*").

[108] *Bell Atlantic v. FCC*, 206 F.3d at 4.

[109] Complaint at 23; Qwest's Legal Analysis at 24; Reply at 14-15; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7. Qwest initially asserted that calls bound for the conference calling companies do not terminate at Farmers' exchange because at least some of the traffic "appears to be" transported to equipment owned by the conference calling companies and located outside the exchange. Qwest's Legal Analysis at 24; Reply at 14. Farmers, however, stated that the traffic at issue is all routed to conference bridges located in Farmers' exchange. McGuire Opening Brief Declaration at 3. In its Opening Brief, Qwest indicated that it was no longer relying on this point. Qwest's Opening Brief at 23 n.90.

[110] Qwest's Legal Analysis at 22; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[111] Answer at 26. Farmers' Opening Brief at 9-10.

to be more persuasive than Qwest's.[112]

33. Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the *termination* points are actually *call initiation* points. Moreover, under Qwest's theory, the exchange carriers serving B, C, and D would all be entitled to charge terminating access. In fact, each of those carriers would be entitled to charge terminating access three times – B's carrier could charge for terminating calls from A, C, and D, and so forth. This conference call with four participants would incur terminating access charges twelve times. Qwest has not addressed this logical consequence of its theory, nor has it offered any evidence that conference calls are treated as terminating with the individual callers for any purpose beyond the circumstances of this case.[113]

34. Qwest tries to analogize this case to calling card platform cases in which the Commission applied an end-to-end analysis and found that calls dialed in to a calling card platform and then routed on to another party terminated with the ultimate called party, not at the platform.[114] In other words, the Commission found that there was one call (from A to B via the calling card platform), not two (A to the platform plus platform to B). This argument is circular, however. It assumes that the calls at issue are routed on to another party, when the very issue to be decided here is whether that is the case. The calling card cases merely address the issue of whether the call terminates at the platform if, in fact, it is routed on to another party beyond the platform.[115]

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[112] The parties argue about whether Qwest would assess terminating access charges in this situation, but the record does not answer the question. According to Farmers, Qwest has admitted that it also bills terminating access for calls to a conference bridge. Farmers' Opening Brief at 2 (citing Response of Qwest Communications Corporation to Interrogatories, File No. EB-07-MD-001 (filed July 10, 2007)). Qwest, however, indicates that conference call providers generally use a different service configuration, relying on special access and 800 service, and states that Qwest has no knowledge of any end user providing a conference bridge service in the same manner as the conference calling companies that entered agreements with Farmers. Qwest Response to Interrogatory No. 1. Qwest does state that in the rare case that a conference call provider did interconnect in the same manner as the conference calling companies in this case, Qwest would assess terminating access charges. In its Reply Brief, however, Qwest says that it would do so only to the extent that it had no reason to know that its customer was a conference calling company. Qwest's Reply Brief at 7. Qwest gives no indication of what it would do if it knew that the customer was a conference calling company. Because the parties have not identified any specific instance in which Qwest actually did charge – or chose not to charge – terminating access for calls to a conference bridge, we find the record inconclusive on this point. In any event, what Qwest would hypothetically charge under similar circumstances is not dispositive here.

[113] Newton's Telecom Dictionary's definition of a "conference bridge" also seems consistent with Farmers' view, speaking of the callers being connected by the bridge, rather than describing the bridge as routing the calls on from one caller to another. Newton's describes a conference bridge as "[a] telecommunications facility or service which permits callers from several diverse locations to be connected together for a conference call." H. Newton, Newton's Telecom Dictionary, at 260 (2006).

[114] Qwest's Legal Analysis at 25-26 (citing *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005), and *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006)).

[115] We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found that it is lawful to impose access charges for the type of service at issue here. *See* Farmers' Legal Analysis at 10 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *AT&T v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001); *Beehive II*, 17 FCC Rcd at 11641). In those cases, the issue of whether access charges were appropriate was never addressed. The parties and the Commission simply assumed that the LECs involved were providing access service, and the dispute was about the lawfulness of their rates.

35. In addition to its argument about where the calls at issue terminate, Qwest also argues that Farmers' tariff does not allow Farmers to assess terminating access charges on calls to the conference calling companies. Farmers' tariff provides that terminating access service allows the customer "to terminate calls from a customer designated premises to an end user's premises."[116] Qwest asserts that the conference calling companies are not end users, and that therefore delivering calls to them does not constitute terminating access service. The record indicates, however, that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with its tariff.

36. Farmers' tariff defines "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and in turn defines "customer" as any entity "which subscribes to the services offered under this tariff."[117] Qwest asserts that the conference calling companies do not subscribe to services offered under Farmers' tariff, and are therefore neither customers nor end users. Thus, Qwest concludes, delivery of traffic to the conference calling companies cannot constitute terminating access under the tariff.

37. Farmers asserts that the conference calling companies are customers because they purchase interstate End User Access Service and pay the federal subscriber line charge.[118] Qwest, however, argues that the conference calling companies nevertheless do not "subscribe" to Farmers' services "under any meaningful definition of that term."[119] Qwest asserts that "subscription" requires the payment of money,[120] but that the conference calling companies effectively pay nothing for Farmers' service because all of their payments are refunded to them in another form – the marketing fees.

38. We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.[121] Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider.[122] For this pivotal proposition, Qwest cites nothing in the tariff itself, but only Black's Law Dictionary's definition of "subscription" as a "written contract by which one engages to . . . contribute a sum of money for a designated purpose . . . in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like."[123] Another dictionary, however, defines "subscribe" as merely "to enter one's name for a publication or service,"[124] and we note that offers of "free subscriptions" are quite common. We reject Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to

[116] Farmers' tariff incorporates the NECA tariff's terms with respect to switched access services. *See* Complaint, Exhibit 9 (Kiesling Tariff) at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 8 (NECA Tariff) at § 6.1.

[117] Complaint Exhibit 8 (NECA Tariff) at § 2.6.

[118] Complaint at vii, 27.

[119] Qwest's Legal Analysis at 27.

[120] Qwest cites only to the Black's Law Dictionary definition of "subscription" for this proposition. Qwest's Legal Analysis at 27.

[121] We express no view on whether the conduct at issue ran afoul of any other statutory provisions not raised by Qwest.

[122] Qwest complains that Farmers has not offered authority to support the alternative view, Qwest's Reply Brief at 5, but Qwest bears the burden of proof here.

[123] Qwest's Legal Analysis at 27.

[124] Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1981, p. 1152.

Farmers.[125] The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users. The record shows that the conference calling companies did subscribe, *i.e.*, enter their names for, Farmers' tariffed services.[126] Thus, the conference calling companies are both customers and end users, and Farmers' tariff therefore allows Farmers to charge terminating access charges for calls terminated to the conference calling companies.

39. Qwest has failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange, and has failed to prove that Farmers' imposition of terminating access charges is inconsistent with its tariff. We therefore deny Counts II and III of the Complaint.

IV. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Count I of the Complaint IS GRANTED IN PART and IS OTHERWISE DENIED, as discussed above.

41. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Counts II and III of the Complaint ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[125] We also note that Qwest has failed to prove that the conference calling companies do not pay Farmers for service because the marketing fees cancel out the tariff payments. Qwest cites a District Court decision concerning the filed rate doctrine to argue that the Commission must consider related transactions in analyzing the amount paid for tariffed services. *Qwest Corp. v. Public Service Comm'n of Utah*, 2006 WL 842891 (D. Utah Mar. 28, 2006) (in determining whether AT&T was paying Qwest the full tariffed rate for a private line, court considered payments from Qwest to AT&T for Qwest's occasional use of the line). As the judge in that case recognized, however, another district court reached the opposite result on the same issue. *See Qwest Corp. v. Minnesota Public Service Comm'n*, 2005 WL 1431652 (D. Minn. Mar. 31, 2005) (once AT&T leased the private line, the transaction was complete, and the tariff was no longer relevant to what price was paid for the tariffed service). Qwest offers no argument as to why we should find the Utah decision more persuasive than the Minnesota ruling.

[126] *See* Answer at vii.

EXHIBIT 2

Augustino, Steve A.

From: Judy Lancaster [Judy.Lancaster@fcc.gov]
Sent: Thursday, October 25, 2007 12:24 PM
To: Augustino, Steve A.
Cc: Gary Schonman; Hillary DeNigro
Subject: FOIA 2007-422

Mr. Augustino:

As we discussed, the darkened passages that you question in your email below were not redacted. Apparently they were highlighted with a dark highlighter that blacks out those sections when those pages are copied. Below I have provided in red those passages that you question.

Sincerely,

Judy Lancaster
Investigations and Hearings Division
Enforcement Bureau
(202) 418-7584

From: Augustino, Steve A. [SAugustino@KelleyDrye.com]
Sent: Friday, September 28, 2007 9:42 AM
To: Judy Lancaster
Subject: RE: FOIA 2007-422

Attachments: Heinen email exchange with NECA.pdf; Heinen email confirmation of receipt.pdf
Ms. Lancaster:
Pursuant to our conversation this morning, attached are two documents where I question the apparent redactions. If these are instances of highlighting by an FCC staff member, I would like to request access to a legible copy of the document.

1. Heinen email January 26, 2005 3:59 pm. For this document, I request that you review the following passages:
"[B]ecause MCI carries the call, MCI bills you as their "end user", and you only provide the hardware ..."
"On June 14, 2004, I contacted the USAC 499 Data Collection Group ... I explained CNE's business and you stated that based on the information I provided to "verbally CNE was not subject to filing form 499A."

Bottom of p.2 of the email. An entire sentence appears to be redacted.
"CNE does not supply transmission services; we use MCI, which provides CNE with toll free numbers for some of our participants to reach our bridges."

The document continues, "Approximately 80% ..."
"CNE provides sophisticate [sic] conferencing services and is "not a telecommunications provider."
2. Heinen email January 26, 2005 3:51 pm. For this document, I request that you review the following passage:
Sentence in the middle of the second paragraph. It appears to begin "I spoke ..." and to end with "not liable."
"I spoke with NECA who determined that we were not liable."

Sincerely,

Steve Augustino

Exhibit 6

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 02-529
Released: March 4, 2002

COMMON CARRIER BUREAU ANNOUNCES RELEASE OF TELECOMMUNICATIONS REPORTING WORKSHEET (FCC FORM 499-A) FOR APRIL 1, 2002 FILING BY ALL TELECOMMUNICATIONS CARRIERS

CC Docket No. 98-171

By this Public Notice, the Common Carrier Bureau (Bureau) announces the release of the revised Telecommunications Reporting Worksheet, FCC Form 499-A ("April 2002 Worksheet") and accompanying instructions. All contributors to the federal universal service support mechanisms, the TRS Fund, the cost recovery mechanism for numbering administration, and the cost recovery mechanism for the shared costs of local number portability must file the April 2002 Worksheet.[1] Contributors to these mechanisms include every telecommunications carrier providing interstate telecommunications and certain other providers of interstate telecommunications for a fee. Thus, all of these entities must complete and file the April 2002 Worksheet on or before April 1, 2002.

Data filed on the April 2002 Worksheet will be used to calculate contributions to the universal service support mechanisms, as well as to the TRS Fund, the cost recovery for numbering administration, and the cost recovery for the shared costs of local number portability. More specifically, the April 2002 Worksheet sets forth the information that contributors must submit, so that the administrators can calculate individual contributions to these mechanisms, or in some cases, determine that an entity's contribution responsibility is *de minimis* -- and thus the entity is exempt from direct contribution -- for the purposes of the universal service support mechanisms.

On July 14, 1999, the Commission amended its rules so that contributors to the universal service support mechanisms, the TRS Fund, and the cost recovery mechanisms for numbering administration and local number portability need only file a single form, the Telecommunications Reporting Worksheet, for the purpose of determining their contributions to these mechanisms.[2] As an attachment to that order, we

[1] 47 C.F.R. §§ 52.1(b), 52.32(b), 54.711(a), 64.604(c)(5)(iii)(B). *See also* 47 C.F.R. § 1.47(h) (requiring every common carrier to file information concerning their designated agents pursuant to the Telecommunications Reporting Worksheet).

[2] *1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, 14 FCC Rcd 16602 (1999) (*Contributor Reporting Requirements Order*) (also adopting an April version of the worksheet that will be used to calculate contributions to the TRS Fund and the cost recovery mechanisms for numbering administration and local number portability, as well as the universal service support mechanisms). Thus, all telecommunications carriers must file the April worksheet, whether or not they meet the *de minimis* threshold for purposes of contributing to the universal service support mechanisms.

released the initial version of the Telecommunications Reporting Worksheet. Since releasing the initial version, we have revised the worksheet based on Commission actions and court decisions as well as made editorial clarifications culminating in the current version, the April 2002 Worksheet. [3]

The April 2002 Worksheets will be compiled and used to calculate contribution factors that will be used as the actual basis for contributions to the four support and cost recovery mechanisms. Contribution factors for each of the mechanisms will be announced by Public Notice.[4] The administrators will bill contributors directly based on the information filed in the April 2002 Worksheets and the publicly-released contribution factors. Payments must be made by the date listed on the administrators' bills.

Contributors must use the April 2002 Worksheet for their filings due on April 1, 2002.[5] Copies of the April 2002 Worksheet (FCC Form 499-A) and instructions may be downloaded from the Commission's Forms Web Page (www.fcc.gov/formpage.html). Finally, copies may be obtained from the National Exchange Carrier Association (NECA) at (973) 560-4400.

For further information, contact Suzanne McCrary, Jim Lande or Kenneth Lynch, Industry Analysis Division, Common Carrier Bureau, at (202) 418-0940.

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[3] *See, e.g., Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order, 15 FCC Rcd 15996, 16026 ¶ 63 (2000) (*Slamming Third Report and Order)* (revising FCC Form 499-A to include registration information). *See also Contributor Reporting Requirements Order*, 14 FCC Rcd at 16621 ¶¶ 39-40 (delegating authority to the Chief of the Common Carrier Bureau to make changes to the Telecommunications Reporting Worksheet). *See also* 47 C.R.R. §§ 52.17(b), 52.32(b), 54.711(c), 64.604(c)(5)(iii)(B).

[4] Contributions to the local number portability cost recovery mechanism are calculated by the local number portability administer.

[5] FCC Form 499-A is typically filed on April 1 of each year. Note, however, that all carriers must notify the FCC within one week if their D.C. Agent for Service of Process or Registration information changes. *See* 47 C.F.R. §§ 1.47, 64.1195. Any such carrier should report changes by completing and filing the relevant pages of the April 2002 FCC Form 499-A, in accordance with the Instructions to the April 2002 FCC Form 499-A.

2002 FCC Form 499-A Telecommunications Reporting Worksheet

Block 3: Carrier's Carrier Revenue Information

301	Filer 499 ID [from Line 101]					
302	Legal name of reporting entity [from Line 102]					
	Report billed revenues for January 1 through December 31, 2001. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars. See instructions regarding percent interstate & international.	Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates: Interstate (b)	If breakouts are not book amounts, enter whole percentage estimates: International (c)	Breakouts: Interstate Revenues (d)	Breakouts: International Revenues (e)
	Revenues from Services Provided for Resale by Other Contributers to Federal Universal Service Support Mechanisms					
	Fixed local service					
303	Monthly service, local calling, connection charges, vertical features, and other local exchange service including subscriber line and PICC charges to IXCs					
a	Provided as unbundled network elements (UNEs)					
b	Provided under other arrangements					
304	Per-minute charges for originating or terminating calls					
a	Provided under state or federal access tariff					
b	Provided as unbundled network elements or other contract arrangement					
305	Local private line & special access service					
306	Payphone compensation from toll carriers					
307	Other local telecommunications service revenues					
308	Universal service support revenues received from Federal or state sources					
	Mobile services (including wireless telephony, paging & messaging, and other mobile services					
309	Monthly, activation, and message charges except toll					
	Toll services					
310	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.)					
311	Ordinary long distance (direct-dialed MTS, customer toll-free 800/888 service, "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)					
312	Long distance private line services					
313	Satellite services					
314	All other long distance services					

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

2002 FCC Form 499-A Telecommunications Reporting Worksheet

Block 4: End-User and Non-Telecommunications Revenue Information

401	Filer 499 ID [from Line 101]					
402	Legal name of reporting entity [from Line 102]					
	Report billed revenues for January 1 through December 31, 2001. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars. See instructions regarding percent interstate & international.	Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates: Interstate (b)	If breakouts are not book amounts, enter whole percentage estimates: International (c)	Breakouts: Interstate Revenues (d)	Breakouts: International Revenues (e)
	Revenues from All Other Sources (end-user telecom. & non-telecom.)					
403	Surcharges or other amounts on bills identified as recovering State or Federal universal service contributions					
	Fixed local services					
404	Monthly service, local calling, connection charges, vertical features, and other local exchange service charges except for federally tariffed subscriber line charges and PICC charges					
405	PICC charges levied by a local exchange carrier on a no-PIC customer and Tariffed subscriber line charges					
406	Local private line and special access service					
407	Payphone coin revenues (local and long distance)					
408	Other local telecommunications service revenues					
	Mobile services (including wireless telephony, paging & messaging, and other mobile services)					
409	Monthly and activation charges					
410	Message charges including roaming, but excluding toll charges					
	Toll services					
411	Prepaid calling card (including card sales to customers and non-carrier distributors) reported at face value of cards					
412	International calls that both originate and terminate in foreign points		0%	100%		
413	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.) other than revenues reported on Line 412					
414	Ordinary long distance (direct-dialed MTS, customer toll-free 800/888 service, "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)					
415	Long distance private line services					
416	Satellite services					
417	All other long distance services					
418	Information services, inside wiring maintenance, billing and collection customer premises equipment, published directory, dark fiber, Internet access, cable TV program transmission, foreign carrier operations, and non-telecommunications revenues (See instructions.)					
419	Gross billed revenues from all sources [incl. reseller & non-telecom.] [Lines 303 through 314 plus Lines 403 through 418]					
420	Universal service contribution bases [Lines 403 through 411 & Lines 413 through 417]					

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

FCC Form 499, February 2002
Approved by OMB 3060-0855
Estimated Average Burden Hours Per Response: 9.5 Hours

Telecommunications Reporting Worksheet, FCC Form 499-A

Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms

* * * * *

NOTICE TO INDIVIDUALS: Section 52.17 of the Federal Communications Commission's rules provides that all telecommunications carriers in the United States shall contribute on a competitively neutral basis to meet the costs of establishing numbering administration, and directs that contributions shall be calculated and paid in accordance with this worksheet. 47 C.F.R. § 52.17. Section 52.32 provides that the local number portability administrators shall recover the shared costs of long-term number portability from all telecommunications carriers. 47 C.F.R. § 52.32. Sections 54.706, 54.711, and 54.713 require all telecommunications carriers providing interstate telecommunications services, providers of interstate telecommunications that offer interstate telecommunications for a fee on a non-common carrier basis, and payphone providers that are aggregators to contribute to universal service and file this Telecommunications Reporting Worksheet (FCC Form 499-A) once a year and the Telecommunications Reporting Worksheet (FCC Form 499-Q) four times a year. 47 C.F.R. §§ 54.706, 54.711, 54.713. Section 64.604 requires that every common carrier providing interstate telecommunications services shall contribute to the Telecommunications Relay Services (TRS) Fund on the basis of its relative share of interstate end-user telecommunications revenues, with the calculation based on information provided in this worksheet. 47 C.F.R. § 64.604(c)(5)(iii)(B). Section 64.1195 requires all telecommunications carriers to register using the FCC Form 499-A. 47 C.F.R. § 64.1195(a).

This collection of information stems from the Commission's authority under Sections 225, 251, 254, and 258 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 225, 251, 254, and 258. The data in the worksheet will be used to calculate contributions to the universal service support mechanisms, the telecommunications relay services support mechanism, the cost recovery mechanism for numbering administration, and the cost recovery mechanism for shared costs of long-term number portability. Selected information provided in the worksheet will be made available to the public in a manner consistent with the Commission's rules.

We have estimated that each response to this collection of information will take, on average, 9.5 hours. Our estimate includes the time to read the instructions, look through existing records, gather and maintain the required data, and actually complete and review the form or response. If you have any comments on this estimate, or how we can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Washington, D.C. 20554, Paperwork Reduction Project (3060-0855). We also will accept your comments via the Internet if you send them to jboley@fcc.gov. Please DO NOT SEND COMPLETED WORKSHEETS TO THIS ADDRESS.

Remember -- You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection, unless it displays a currently

Note that under interim guidelines,[17] the FCC provides the following safe harbor percentages of interstate revenues associated with Line (309), Line (409) and Line (410):

15% of cellular and broadband PCS telecommunications revenues
12% of paging revenues
1% of analog SMR dispatch revenues

Wireless telecommunications providers that choose to avail themselves of these safe harbor percentages for interstate revenues may assume that the FCC will not find it necessary to review or question the data underlying their reported percentages.

4. Explanation of revenue categories

The revenue detail provided on Lines (303) through (314) and Lines (403) through (418) should total to total gross revenues reported on Line (419). This section explains the detailed revenue categories.

Filers are instructed to report revenues from other universal service contributors on lines (303) through (314). Filers are instructed to report all other revenues on lines (403) through (418). In many cases, the line-item categories are duplicated in the two sections. Carriers that are required to use the Uniform System of Accounts (USOA) prescribed in Part 32 of the Commission's rules should base their responses on their USOA account data and supplemental records, dividing revenues into those received from universal service contributors and those received from end users and other non-contributors. All filers should report revenues based on the following descriptions.

Fixed local service revenue categories

Fixed local services connect a specific point to one or more other points. These services can be provided using either wireline or fixed wireless technologies and can be used for either local exchange service, private communications, or access to toll services.

Line (303) and Line (404) -- Monthly service, local calling, connection charges, vertical features, and other local exchange services should include the basic local service revenues except for local private line revenues, access revenues, and revenues from providing mobile or cellular services. This line should include charges for optional extended area service, dialing features, added exchange services such as automatic number identification (ANI) or teleconferencing, local number portability (LNP) surcharges, connection charges, charges for connecting with mobile service and local exchange revenue settlements. Revenues for services provided to carriers should be divided between Line (303a) -- provided as unbundled network elements (UNEs) -- and Line (303b) -- provided under tariffs or arrangements other than unbundled network elements (for example, resale). Line (303b) should include Presubscribed Interexchange Carrier Charge (PICC) charges levied on carriers. Line (404) should include charges identified on customer bills as subscriber line charges, but that are not provided under a tariff filed by the reporting entity or its underlying carrier.

Line (304) – Line (304) should include per-minute charges for originating or terminating calls. This line also would include revenues to the local exchange carrier for messages between a cellular customer and another station within the mobile service area. The line should include any other gross charges to other carriers for the origination or termination of toll or non-toll traffic. Do not deduct or net payments to carriers for origination or termination of traffic on their networks. Revenues for originating and terminating minutes

[17] *Federal-State Joint Board on Universal Service*, CC Docket No. 096-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 21252, 21258-60 (1998).

Toll service revenue categories

Toll services are telecommunications services, wireline or wireless, that enable customers to communicate outside of local exchange calling areas. Toll service revenues include intrastate, interstate, and international long distance services.

Line (411) -- This line should include revenues from prepaid calling cards provided either to customers or to retail establishments. Gross billed revenues should represent the amounts actually paid by customers and not the amounts paid by distributors or retailers, and should not be reduced or adjusted for discounts provided to distributors or retail establishments. All prepaid card revenues are classified as end-user revenues.

Line (412) -- International calls that traverse the United States but both originate and terminate in foreign points are excluded from the universal service contribution base regardless of whether the service is provided to resellers or to end users. These revenues should be segregated from other toll revenues by showing them on Line (412). Telecommunications providers should not report international settlement revenues from traditional settlement transiting traffic on the worksheet.

Line (310) and Line (413) -- Operator and toll calls with alternative billing arrangements should include all calling card or credit card calls, person-to-person calls, and calls with alternative billing arrangements such as third-number billing, collect calls, and country-direct type calls that either originate or terminate in a U.S. point. These lines should include all charges from toll or long distance directory assistance. Lines (310) and (413) should include revenues from all calls placed from all coin and coinless, public and semi-public, accommodation and prison telephones, except that calls that are paid for via prepaid calling cards should be included on line (411) and calls paid for by coins deposited in the phone should be included on line (407).

Line (311) and Line (414) -- Ordinary long distance and other switched toll services should include amounts from account 5100 -- long distance message revenues-- except for amounts reported on Lines (310), (407), (411), (412) or (413). Line (311) and Line (414) should include ordinary message telephone service (MTS), WATS, toll-free, 900, "WATS-like," and similar switched services. This category includes most toll calls placed for a fee and should include flat monthly charges billed to customers, such as account maintenance charges, PICC pass-through charges, package plans giving fixed amounts of toll minutes, and monthly minimums.

Line (312) and Line (415) -- Long distance private line service should include revenues from dedicated circuits, private switching arrangements, and/or predefined transmission paths, extending beyond the basic service area. Line (312) and Line (415) should include frame relay and similar services where the customer is provided a dedicated amount of capacity between points in different basic service areas. This category should include revenues from the resale of special access services if they are included as part of a toll private line service.

Line (313) and Line (416) -- Satellite services should contain revenues from providing space segment service and earth station link-up capacity used for providing telecommunications or telecommunications services via satellite. Revenues derived from the lease of bare transponder capacity should not be included on lines (313) and (516).

Line (314) and Line (417) -- All other long distance services should include all other revenues from providing long distance communications services. Line (314) and Line (417) should include toll teleconferencing. Line (314) and Line (417) should include switched data, frame relay and similar services where the customer is provided a toll network service rather than dedicated capacity between two points.

Declaration of David C. Mussman

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

My name is David C. Mussman and I am over eighteen years old. I am the General Counsel of West Corporation, the parent and sole shareholder of InterCall, Inc. My address is 11808 Miracle Hills Drive, Omaha, NE 68154. I am providing this Declaration in compliance with the requirements of section 1.16 of the Federal Communications Commission's (the "Commission") rules, 47 C.F.R. § 1.16.

Under penalty of perjury, I hereby declare that the following is true and correct to the best of my knowledge and belief:

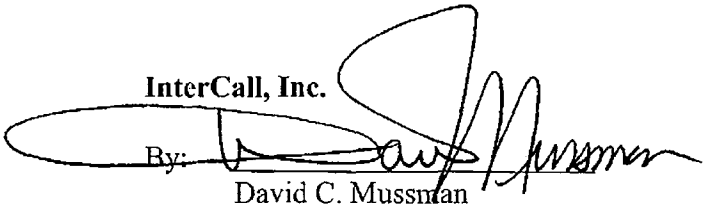
1. I have been actively involved in the Universal Service Administrative Company's investigation into whether InterCall, Inc. ("InterCall") is obligated to file forms and contribute to the Universal Service Fund.

2. I have reviewed InterCall's Request for Review of Decision of Universal Service Administrator. I have attached documents that are relevant to and in support of the Request for Review.

3. The information and documentation included in the Request for Review are true and correct to the best of my knowledge.

IN WITNESS WHEREOF, the above-mentioned corporation has caused this instrument to be executed on February 1, 2008.

InterCall, Inc.

By: 

David C. Mussman

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2008, I served a copy of the foregoing "Request for Review by Intercall, Inc. of Decision of Universal Service Administrator" on the following parties by the methods indicated below.

Marlene H. Dortch, Secretary*
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

David Capozzi, Esquire
Universal Service Administration Company^
2000 L Street, NW
Suite 200
Washington, DC 20036

Tara Mahoney

*via ECFS
^via first class mail